

(23,917)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 286.

JOHN A. S. BROWN AND FRANK E. SCHERMERHORN,
TRUSTEE, &c., PETITIONERS,

vs.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF
CONRAD MORRIS BRAKER, &c.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SECOND CIRCUIT.

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BILL OF COMPLAINT.

IN THE CIRCUIT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*John A. S. Brown, a Citizen of the
State of Pennsylvania, and
Frank E. Schermerhorn, as
Trustee for Clara Schermer-
horn, Under the Last Will and
Testament of Thomas Cun-
ningham, Deceased, and a Citi-
zen of the State of Pennsyl-
vania,*

versus

*Austin B. Fletcher, as Testament-
ary Trustee of Conrad Morris
Braker, Under the Last Will
and Testament of Conrad
Braker, Jr., Deceased, and a
Citizen of the State of New
York.*

Sess., 1911.

No. 231.

In Equity.

*To the Honorable, the Judges of the Circuit Court of
the United States, for the Southern District of
New York:*

John A. S. Brown, of the city of Philadelphia, State of Pennsylvania, and a citizen of the said State of Pennsylvania, and Frank E. Schermerhorn as trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, also of the city of Philadelphia, State of Pennsylvania, and a citizen of the said State of Pennsylvania, bring this their bill of complaint against Austin B. Fletcher,

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as testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, and thereupon your orators complain and say:

First.—That your orator, John A. S. Brown, is a resident of the city of Philadelphia, State of Pennsylvania, and a citizen of the said State of Pennsylvania; and that your orator, Frank E. Schermerhorn, is trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, and is a resident of the city of Philadelphia, State of Pennsylvania, and a citizen of the said State of Pennsylvania; and that the respondent, Austin B. Fletcher is testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, and is a resident of the city of New York, State of New York, and a citizen of the said State of New York.

Second.—That the aforementioned Conrad Braker, Jr., departed this life on the twenty-first day of July, 1890, having first made and published his last will and testament in writing, bearing date the twentieth day of February, 1890, a copy of which is hereunto annexed, marked "A" and made a part of this bill of complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth. That the said Conrad Braker, Jr., at the time of his decease, was a resident of the City, County and State of New York.

Third.—That on the thirteenth day of September, 1890, the said will was duly admitted to probate by the Surrogate's Court of the county of New York, in the State of New York, and there recorded in Book of Wills, No. 435, at page 383 and following.

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That thereupon letters testamentary were issued out of the said court to Henry J. Braker and Frances J. Braker, as executor and executrix respectively of the said last will and testament; and the said executor and executrix took upon themselves the duty of administering the estate of the said Conrad Braker, Jr., deceased, and received and collected the assets thereof.

Fourth.—That out of and from the assets of the said estate so received and collected as aforesaid, the aforementioned executor and executrix paid over to Henry J. Braker the sum of \$50,000 in trust for the special benefit of Conrad Morris Braker, the son of the aforesaid testator, Conrad Braker, Jr., such payment being made in accordance with the provisions of the "Fourteenth" paragraph of the aforementioned will of the said testator, and to be held in trust by the said trustee as likewise provided for and directed by the said paragraph of the said will.

Fifth.—That by an order and decree of the said Surrogate's Court of the county of New York, entered the sixteenth day of November, 1897, Austin B. Fletcher, defendant herein, was appointed as testamentary trustee for Conrad Morris Braker under the aforementioned last will and testament of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker, and to execute the unexecuted trusts of which the said Henry J. Braker was trustee under the said will.

Sixth.—That under and by virtue of the aforementioned "Fourteenth" paragraph of the last will and testament of the said Conrad Braker, Jr., deceased, the aforementioned Conrad Morris Braker became entitled to receive and to have paid to him

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the sum of \$20,000 out of and from the principal sum of \$50,000 so held in trust for him as aforesaid, if he should be living at the expiration of ten years from the date of the decease of the said testator, Conrad Braker, Jr., to wit, on the twenty-first day of July, 1900.

That by the said "Fourteenth" paragraph of the said will, it was further provided and directed, that, should the said Conrad Morris Braker be living at the expiration of fifteen years from the date of the said testator's decease, to wit, on the twenty-first day of July, 1905—there should be then and there paid to him the further sum of \$20,000 out of and from the balance of the principal sum of \$50,000 so held in trust for him as aforesaid. And further, that, should the said Conrad Morris Braker be living at the expiration of twenty years from the date of the said testator's decease—to wit, on the twenty-first day of July, 1910—there should be then and there paid to him, the remaining \$10,000 of the principal sum of \$50,000 so held in trust for him as aforesaid.

Seventh.—That the said Conrad Morris Braker was living at the expiration of each of the several respective periods particularly specified in the said "Fourteenth" paragraph of the said will; and then and there became entitled to receive and to have paid to him the several sums of money also particularly specified and directed by the said paragraph of the said will, out of and from the principal sum of \$50,000 so held in trust for him as aforesaid.

Eighth.—That, as your orators are informed and verily believe, the first aforementioned sum of \$20,000 was duly paid to the said Conrad Morris Braker, on the twenty-first day of July, 1900.

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Ninth.—That on the thirteenth day of June, 1901, and by a certain instrument in writing, bearing date of that day, the said Conrad Morris Braker sold and assigned to one Frank L. Rabe any and all the estate, right, title and interest of the said Conrad Morris Braker of, in and to the principal sum of fifty thousand dollars (\$50,000) to which he, the said Conrad Morris Braker, was entitled under and by virtue of the "Fourteenth" clause of the last will and testament of the said Conrad Braker, Jr., deceased, subject only to the payment of certain sums theretofore assigned therefrom by the said Conrad Morris Braker as follows: to Mehry R. Loeb, five thousand dollars (5000) with interest from January 25, 1902, and to William H. Sage, eight thousand dollars (\$8000) together with his expenses of collecting the same. That the said assignment was duly recorded in the office of the Register of the County of New York, in Liber 4 of Miscellaneous Instruments, page 125, on the twenty-eighth day of June, 1901, and also in the office of the Surrogates of the County of New York, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 190, on the twenty-first day of December, 1906.

That a copy of the said assignment is hereunto annexed, marked "B", and is made a part of this bill of complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Tenth.—That out of and from the assets of the said estate so received and collected as aforesaid, the aforementioned executor and executrix paid over to Henry J. Braker the sum of \$50,000 in trust for the special benefit of Conrad Morris Braker, the son of the aforesaid testator, Conrad Braker, Jr., such pay-

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ment being made in accordance with the provisions of the "Fifteenth" paragraph of the aforementioned will of the said testator, and to be held in trust by the said trustee as likewise provided for and directed by the said paragraph of the said will.

Eleventh.—That out of and from the assets of the said estate so received and collected as aforesaid, the aforementioned executor and executrix paid over to Henry J. Braker all that remained out of the certain "other one-half of all the rest, residue and remainder, both real and personal, wheresoever situated," in trust for the special benefit of Conrad Morris Braker, the son of the aforesaid testator, Conrad Braker, Jr., such payment being made in accordance with the provisions of the "Sixteenth" paragraph of the aforementioned will of the said testator, and to be held in trust by the said trustee as likewise provided for and directed by the said paragraph of the said will, such remainder, as your orators are informed and verily believe, aggregating \$120,731.50.

Twelfth.—That under and pursuant to the provisions of the aforementioned "Fifteenth" paragraph of the said last will and testament, the said sum of \$50,000 so held in trust for the said Conrad Morris Braker, as aforesaid, was to be paid to the said Conrad Morris Braker when he should attain the age of fifty-five years, to wit, on the twenty-fifth day of February, 1913.

Thirteenth.—That under and pursuant to the provisions of the aforementioned "Sixteenth" paragraph of the said last will and testament, the whole amount so held in trust for the said Conrad Morris Braker, less the sum of \$25,000 was to be paid to the said Conrad Morris Braker when he should attain the age

Bill of Complaint

of fifty-five years, to wit, on the twenty-fifth day of February, 1913.

Fourteenth.—That on the eighteenth day of April, 1901, and by a certain instrument in writing, bearing date of that day, the said Conrad Morris Braker sold and assigned to one Frank L. Rabe, seven-tenths of all the estate, right, title and interest of the said Conrad Morris Braker of, in and to the principal sum of \$50,000, to which he, the said Conrad Morris Braker, was entitled under and by virtue of the "Fifteenth" clause of the last will and testament of the said Conrad Braker, Jr., deceased, and, also so much of all the estate, right, title and interest of the said Conrad Morris Braker of, in and to the principal sum to which he, the said Conrad Morris Braker, was entitled under and by virtue of the "Sixteenth" clause of the last will and testament of the said Conrad Braker, Jr., deceased, as might be necessary to make up to the said Frank L. Rabe, the net sum of \$35,000, should the trust fund so created as aforesaid by the fifteenth clause of the aforementioned will at any time be diminished by reason of any cause or thing whatsoever below the said principal sum of \$50,000. That the said assignment was duly recorded in the office of the Register of the County of New York, in Liber 4 of Miscellaneous Instruments, page 74, on the twenty-seventh day of April, 1901; and also further recorded in the office of the Surrogates of the County of New York in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 195, on the twenty-first day of December, 1906. A copy of the said assignment is hereunto annexed, marked "C", and is made a part of this bill of complaint to all intents and purposes and with the same

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force and effect as if herein fully and at large set forth.

Fifteenth.—That on the first day of October, 1901, and by a certain instrument in writing, bearing date of that day, the said Frank L. Rabe, duly sold and assigned unto the New York Finance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, all the estate, right, title and interest of the said Conrad Morris Braker under clause "Fifteen" in the will of Conrad Braker, Jr., deceased, as well as all the estate, right, title and interest of the said Frank L. Rabe of, in and to the interest of Conrad Morris Braker under clause "Fourteen" in the will of the said Conrad Braker, Jr., deceased, and all and every part or parcel thereof. That the said assignment was duly recorded in the office of the Surrogates of the County of New York, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 200, on the twenty-first day of December, 1906.

That a copy of the said assignment is hereunto annexed, marked "D" and is made a part of this bill of complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

That thereafter, and in order to prevent any difficulty and misunderstanding as to the true intent and purpose of the said assignment from the said Frank L. Rabe to the said New York Finance Company, dated the first day of October, 1901, the said Frank L. Rabe, on the fourth day of January, 1907, and by a certain instrument in writing, bearing date of that day, did further assure the interest and title so intended to be conveyed as aforesaid. That the said assignment was duly recorded in the office of the

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Surrogates of the County of New York, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 236, on the fourteenth day of January, 1907.

That a copy of the said assignment is hereunto annexed, marked "E" and made a part of this bill of complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Sixteenth.—That on the nineteenth day of December, 1906, the said New York Finance Company did make and deliver unto John A. S. Brown, and unto Frank E. Schermerhorn as trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, its certain promissory note bearing date also of that day, and providing for the payment of the certain sum of \$10,000 on the twenty-first day of July 1910, together with interest thereon at the rate of six per cent. per annum; and as security for the payment of the said note did also make, execute and deliver unto the said John A. S. Brown, and unto the said Frank E. Schermerhorn as trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, an assignment of the certain part of all the right, title and interest of the said New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to wit, a one-half part of the certain estate, right, title and interest, and any and all moneys coming to the said New York Finance Company therefrom which had been theretofore sold and assigned by the said Frank L. Rabe to the said New York Finance Company by the aforementioned instrument dated October 1, 1901 as by the said assignment bearing date the said nineteenth day of December, 1906, will more

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fully and at large appear. That the said assignment was duly recorded in the office of the Surrogates of the County of New York, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 204, on the twenty-first day of December, 1906.

That a copy of the said note and also a copy of the said assignment are hereunto annexed, marked respectively "F" and "G" and are made a part of this bill of complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Seventeenth.—That the said New York Finance Company defaulted in the promise particularly made and provided for in the aforementioned note, to wit, in the payment of the sum of \$10,000 therein provided for, and also in the payment of certain interest thereon for more than fifteen days after the same became due and payable.

Eighteenth.—That after such default in the payment of the aforementioned note as aforesaid, your orators, being the holders of the said note, and under the power and authority given to them by the said note and collateral assignment, did, on the third day of May, 1911, cause the aforementioned collateral to the said note to be sold at public sale, in the city of Philadelphia, State of Pennsylvania; and such sale thereof was made at such public sale to one Charles Z. Wolff for the sum of \$2000, the said Charles Z. Wolff being the highest bidder, and that being the highest bid therefor.

Nineteenth.—That thereafter, and by a certain instrument in writing, bearing date the sixth day of May, 1911, for the aforementioned consideration of \$2000 and also pursuant to such aforementioned sale

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thereof, your orators did sell and assign unto the said Charles Z. Wolff all and every their, and each of their respective right, title and interest in and to the estate of Conrad Braker, Jr., deceased, so assigned to them as hereinbefore more particularly alleged and set forth. That the said assignment was duly recorded in the office of the Surrogates of the County of New York, in Liber of Conveyances and Mortgages of Interests in Decedents' Estates, page , on the day of , 1911.

That a copy of the said assignment is hereunto annexed, marked "H" and is made a part of this bill of complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Twentieth.—That thereafter, and by a certain instrument in writing bearing date the sixth day of May, 1911, the aforementioned Charles Z. Wolff duly sold and assigned to your orators all and every the estate, right, title and interest of the said Charles Z. Wolff in and to the estate of Conrad Braker, Jr., deceased, so sold and assigned to him as hereinbefore more particularly alleged and set forth. That the said assignment was duly recorded in the office of the Surrogates of the County of New York, in Liber of Conveyances and Mortgages of Interests in Decedents' Estates, page , on the day of , 1911.

That a copy of the said assignment is hereunto annexed, marked "I" and is made a part of this bill of complaint to all intents and purposes and with the same force and effect as if herein fully and at large set forth.

Twenty-first.—That under and by virtue of the aforementioned "Fourteenth" paragraph of the last will and testament of the said Conrad Braker, Jr.,

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deceased, the aforementioned Conrad Morris Braker became entitled to receive and to have paid to him the sum of \$20,000 out of and from the balance of the principal sum of \$50,000 so held in trust for him as aforesaid at the expiration of fifteen years from the date of the said testator's decease, to wit, on the twenty-first day of July, 1905.

That your orators are informed and verily believe the said sum of \$20,000 was duly paid to the respective aforementioned assignees of the said Conrad Morris Braker hereinbefore more particularly mentioned and referred to, to wit, Mehry R. Loeb, William H. Sage and the New York Finance Company, and that thereupon and thereafter there was still left in the hands of the said trustees a balance of the said principal sum of \$50,000, to wit, the sum of \$10,000.

Twenty-second.—That under and by virtue of the aforementioned "Fourteenth" paragraph of the last will and testament of Conrad Braker, Jr., deceased, the aforementioned Conrad Morris Braker became entitled to receive and to have paid to him, on the twenty-first day of July, 1905, the aforementioned balance of the said principal sum of \$50,000, to wit, \$10,000 so held in trust for him as aforesaid.

Twenty-third.—That by virtue of the several assignments hereinbefore particularly specified and set forth, your orators became vested with and entitled to receive the last aforementioned sum of \$10,000 otherwise payable to the said Conrad Morris Braker on the twenty-first day of July, 1910, as hereinbefore alleged and set forth.

Your orators further show and allege that the defendant, Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the last will and

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testament of Conrad Braker, Jr., deceased, has neglected and refused, and still neglects and refuses to pay to your orators the said sum of \$10,000 or any part thereof, payable to them under the "Fourteenth" paragraph of the aforementioned last will and testament of Conrad Braker, Jr., deceased; and your orators well hoped that the said Austin B. Fletcher, as such trustee as aforesaid, would have complied with said reasonable request of your orators as in equity and good conscience he should have done. All of which actions and things of the said Austin B. Fletcher, as such testamentary trustee aforesaid are contrary to equity and good conscience, and done to the manifest wrong, injury and oppression of your orators.

In consideration whereof, and for as much as your orators are without adequate remedy in the premises to and by the strict rules of the common law, and can only obtain relief in this Honorable Court, where matters of this nature are properly cognizable and relievable: to the end, therefore, that the said Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, may without oath, to the best and utmost of his expected knowledge, remembrance, information and belief, full, true and perfect answer make to all and singular the matters aforesaid, and that as fully and particularly as if the same were here repeated, and he distinctly interrogated thereto, and that your orators may be declared entitled to the immediate possession of the said sum of \$10,000 under the said "Fourteenth" clause of the said last will and testament of Conrad Braker, Jr., deceased, and that the said Austin B. Fletcher, as such testamentary trustee aforesaid, may be decreed, adjudged and

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directed to pay to your orators the said sum of \$10,000 so due and payable to them as hereinbefore particularly alleged and set forth; and that your orators may have such further and general relief in the premises as the nature of the case may require, and shall be agreeable to equity and good conscience.

Twenty-fourth.—And your orators further pray that the court may issue a writ of subpoena to the defendant above-named, Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, thereby commanding him at a certain time and under a certain penalty therein to be limited, personally to appear before your Honorable Court and then and there full, true and perfect answer make, but not under oath, answer under oath being hereby expressly waived, to all and singular the premises, and further to stand to, perform and abide by such further order or direction or decree herein as to your Honorable Court may seem meet.

And your orators will ever pray.

(Signed)

JNO. A. S. BROWN,

(Signed)

FRANK E. SCHERMERHORN,

*As Trustee for Clara Schermerhorn,
Under the Last Will and Testa-
ment of Thomas Cunningham,
Deceased.*

FREDRIC W. FROST,

Solicitor and of Counsel

for Complainants,

60 Wall Street,

New York City.

Bill of Complaint

STATE OF PENNSYLVANIA, } ss.:
 CITY AND COUNTY OF PHILADELPHIA, }

John A. S. Brown, and Frank E. Schermerhorn as trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, being severally sworn according to law, depose and say; that they are the complainants named in the foregoing bill of complaint; that they have read the foregoing bill of complaint and know the contents thereof, and that the allegations of said complaint are true in substance and in fact except in matters therein stated on information and belief, and as to said matters they believe it to be true.

Sworn and sub-
 scribed to be-
 fore me, this
 31st day of
 May, A. D.
 1911.

(Signed)

JNO. A. S. BROWN,

(Signed)

FRANK E. SCHERMERHORN,
*As Trustee for Clara Schermer-
 horn, Under the Last Will
 and Testament of Thomas
 Cunningham, Deceased.*

(Signed)

GEORGE KOPPENHOEFER, JR.,

(Seal)

Notary Public.

My commission expires March 10, 1913.

Bill of Complaint

(Seal).
1775.

Affidavit (Notary).

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.:

I, Henry F. Walton, prothonotary of the County of Philadelphia, and clerk of the courts of common pleas of said county, which are courts of record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify: That Geo. Koppenhoefer, Jr., Esquire, before whom the annexed affidavit was made, was at the time of so doing a Notary Public for the Commonwealth of Pennsylvania, residing in the County of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgements and proofs of deeds or conveyances for lands, tenements, and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 31st day of May, in the year of our Lord one thousand nine hundred and eleven (1911).

HENRY F. WALTON,
Prothonotary.

Will of Conrad Braker, Jr.

"A"

WILL OF CONRAD BRAKER, JR.

IN THE NAME OF GOD, AMEN.

I, Conrad Braker, Jr., of the City, County and State of New York, being of sound mind and memory and knowing the uncertainty of this mortal life, do make, publish and declare this to be my Last Will and Testament, hereby revoking and annulling all wills by me heretofore made, in manner and form following, that is to say:

FIRST. I direct that all my just debts and funeral expenses be paid as soon as convenient.

SECOND. I give, devise and bequeath to my beloved wife, Frances J. Braker, the sum of One Hundred and twenty-five thousand dollars (\$125,000) and I direct that the same shall be and belong to her absolutely and free from any restrictions of whatsoever nature, and I further direct that the same shall be paid to her within eighteen months after my decease, with interest at the rate of Five (5) per centum per annum, payable quarterly upon the amount paid until the entire sum is paid.

It is my desire and I so direct that the above bequest shall have priority over any and all other bequests made in this my Last Will and Testament, and if not paid immediately upon my decease, I direct that such reasonable security as she may desire shall be given her for its payment within the time specified.

And I further give, devise and bequeath unto my said wife, all my furniture, pictures, plate, jewelry, ornaments, horses, carriages, wagons and harness, and I direct that the above provisions made for her shall be received in lieu of dower.

Will of Conrad Braker, Jr.

THIRD. I give devise and bequeath to my son Henry J. Braker, his heirs and assigns, all my real and personal property of whatsoever nature or description situated in Hamilton Township, McKean County, State of Pennsylvania, consisting of Warrant No. 4912 and containing about ten hundred and fifty acres (1050): also my mill property at New Brooklyn, (now called South Plainfield) New Jersey. The same to be and belong to him absolutely and at his disposal.

And I further direct that should any of the property mentioned in this section be sold or otherwise disposed of previous to my death, that within twelve months after my decease my said son, Henry J. Braker, shall in its place receive the amount obtained for the same.

FOURTH. I give, devise and bequeath unto my son, Conrad Morris Braker, his heirs and assigns, my property in Nyack-on-the-Hudson, State of New York, the same being situated on Broadway in the said City and consisting of about two (2) acres of land; also my property in Township No. 41, Jefferson County, State of Missouri, consisting of about 120 (one hundred and twenty acres). Also my interest in about ninety-six acres of land, known as Disbrough Farm and situated in Millstone, Hilborough Township, Somerset County, New Jersey, my interest in the same being sixty-five per cent (65%). Also my lot consisting of about two acres in New Brooklyn, New Jersey; the same being distinct and apart from the property in said New Brooklyn given to my son Henry J. Braker, the same to be and belong to him absolutely and at his disposal.

And I further direct that should any of the property mentioned in this Section be sold or otherwise disposed of previous to my death, that within twelve

Will of Conrad Braker, Jr.

months after my decease my said son, Conrad Morris Braker, shall in its place receive the amount obtained for the same.

FIFTH. I give, devise and bequeath unto my sister, Mrs. Louise Eckart, to have and to hold to her, her heirs, executors, administrators and assigns forever the sum of Twenty Thousand \$(20,000) Dollars, the same to be paid to her within two years after my decease with interest at the rate of Five (5) per centum per annum, to be paid quarterly upon the amount remaining, until the entire sum is paid.

SIXTH. I give, devise and bequeath unto my brother, George Braker, to have and to hold to him, his heirs, executors, administrators and assigns forever, the sum of Twenty Thousand (\$20,000) Dollars, the same to be paid to him within two years after my decease, with interest at the rate of Five (5) per centum per annum, to be paid quarterly upon the amount remaining unpaid until the entire sum is paid.

SEVENTH. I give, devise and bequeath unto my brother, John Henry Braker, to have and to hold to him, his heirs, executors, administrators and assigns forever, the sum of Fifteen Thousand (\$15,000) Dollars, and I direct that the same shall be paid to him within two years after my decease with interest payable quarterly upon the amount remaining unpaid at the rate of Five (5) per centum per annum until the entire sum be paid.

EIGHTH. I give, devise and bequeath to Mrs. Charles E. Morris, now of the City of Brooklyn, State of New York, the sum of One Thousand (\$1,000) Dollars, the same to be and belong to her, without restric-

Will of Conrad Braker, Jr.

tion, and I direct that the said sum shall be paid to her within One Year from my decease.

NINTH. I give, devise and bequeath to my friend, William D. Faris, now of the City of Brooklyn, State of New York, the sum of One Thousand (\$1,000) Dollars, the same to be and belong to him absolutely and without restriction, and I direct that the said sum be paid to him within One Year from my decease.

TENTH. I give, devise and bequeath to William V. McKenzie, of Rahway, State of New Jersey, the sum of One Thousand (\$1,000) Dollars, and direct that the same shall be paid to him within One Year from the date of my decease.

ELEVENTH. After the above payments have been made as aforesaid and directed, I give, devise and bequeath one-half of the rest, residue and remainder of my estate both real and personal, of whatsoever description and wheresoever situated to my son Henry J. Braker, his heirs and assigns, the same to be and belong to him absolutely and without restriction.

TWELFTH. Out of the other one-half ($\frac{1}{2}$) of all the rest, residue and remainder of my estate, both real and personal wheresoever situated, I give and bequeath to my son, Conrad Morris Braker, the sum of Thirty Thousand Dollars (\$30,000), and I direct that of this sum, Five Thousand Dollars (\$5,000) shall be paid to him within sixty (60) days from the date of my decease, and the remaining Twenty-five Thousand Dollars (\$25,000) of the above Thirty Thousand Dollars (\$30,000), shall be paid to him within six months from the date of my decease, and until the above amounts are paid to him, I direct that he shall receive interest on the same at the rate of five (5) per centum per annum.

Will of Conrad Braker, Jr.

THIRTEENTH. Out of the above said other one-half of all the rest, residue and remainder of my estate, both real and personal, wheresoever situated, I give and bequeath to William D. Faris the sum of Twenty Thousand Dollars (\$20,000) and I direct that the same shall be paid to him within nineteen months of the date of my decease, and that he shall hold the same in trust for the benefit of my grand-child, Florence May Braker, until she shall attain the age of twenty-one years, which will be May thirtieth, nineteen hundred and five (A. D. 1905) at which time I direct that the said sum together with any accrued and unpaid interest or increase shall be paid to her and be and belong to her absolutely. But I further direct that, if it shall appear necessary to the said trustee for the proper maintenance, support or education of my said grand-child, the interest or increase derived from this bequest may be used for and applied to the above purposes, and her receipt notwithstanding her infancy, shall be an effectual discharge for the same, but the principal shall remain intact until May thirtieth, nineteen hundred and five (A. D. 1905) if she shall live until that date. In the event of the death of my said grand-child, Florence May Braker, before she attains the age of twenty-one years, I direct that the principal and any accrued and unpaid interest or increase shall be paid to my son, Conrad Morris Braker within six months of the date of her decease, if he be then living, if he shall not be living at the date of the death of my said grand-child, Florence May Braker, I direct that the said bequest shall revert to my residuary estate.

FOURTEENTH. Out of the above said other one-half of all the rest, residue and remainder of my estate, both real and personal wherever situated, I give and

Will of Conrad Braker, Jr.

bequeath to Henry J. Braker the sum of Fifty Thousand Dollars (\$50,000), and I direct that the same shall be paid to him within nineteen months from the date of my decease, and that he shall hold the same IN TRUST and securely invested for the special benefit of my son, Conrad Morris Braker, and I direct that the interest or increase on the same or on such an amount as shall be unpaid as hereinafter set forth, shall be paid to him quarterly so long as he shall live, but I further direct that if he be living at the expiration of ten years from the date of my decease that the said trustee shall pay to my said son, Conrad Morris Braker, the sum of Twenty Thousand Dollars (\$20,000) of said principal together with any accrued and unpaid interest should there be any, and the same shall be and belong to him absolutely.

Should my said son be living at the expiration of fifteen years from the date of my decease, I direct that he shall be paid the further sum of Twenty Thousand Dollars (\$20,000), together with any accrued and unpaid interest on the said remaining Thirty Thousand Dollars (\$30,000) and the same shall be and belong to him absolutely.

Should my said son be living at the expiration of twenty years from the date of my decease, I direct that the remaining Ten Thousand Dollars (\$10,000) of the above mentioned sum, together with any accrued and unpaid interest on the said remaining Ten Thousand Dollars (\$10,000) shall be paid to him and the same shall be and belong to him absolutely.

FIFTEENTH. Out of the said other one-half of all the rest, residue and remainder of my estate, both real and personal wheresoever situated, I give and bequeath to my son, Henry J. Braker, the further sum of Fifty

Will of Conrad Braker, Jr.

Thousand Dollars (\$50,000) and I direct that the same shall be paid to him within three years from the date of my decease, and that he shall hold the same in trust and securely invest it for the benefit of my said son, Conrad Morris Braker, paying him the interest derived from the same semi-annually from the date of my decease until he shall attain the age of fifty-five years, when I direct that the principal and any unpaid interest shall be paid to him and belong to him absolutely.

In the event of the death of my said son, Conrad Morris Braker, before he attains the age of fifty-five years, I direct that the income derived from the said Fifty Thousand Dollars (\$50,000) shall be paid semi-annually to Florence L. Braker, wife of my said son, Conrad Morris Braker, so long as she shall live and remains unmarried; in the event of her marriage or death, I direct that the said Fifty Thousand Dollars (\$50,000) shall be given to my grandchild, Florence May Braker, if she then be living, and if she be not living then the said Fifty Thousand Dollars (\$50,000) shall be paid to my son, Henry J. Braker, if he be living, if he be dead, I direct that it sink into my residuary estate.

SIXTEENTH. I direct that all that remains out of the above said "other one-half of all the rest, residue and remainder, both real and personal, wheresoever situated," after the bequests made in sections Twelfth, Thirteenth, Fourteenth and Fifteenth shall have been provided for, shall be held In Trust by my wife, Frances J. Braker, and my son, Henry J. Braker, and their duly appointed successors, for the benefit of my said son, Conrad Morris Braker, until he shall attain the age of fifty-five years, and I direct that the interest derived from said trust shall be paid to him semi-

Will of Conrad Braker, Jr.

annually, and when he shall have attained the age of fifty-five years, I direct that the whole amount less the sum of Twenty-five Thousand Dollars (\$25,000) shall be paid and belong to him absolutely.

SEVENTEENTH. I direct that if my son, Conrad Morris Braker, shall attain the age of fifty-four years that the trustees of the fund referred to in the above section shall purchase with the said twenty-five thousand dollars (\$25,000) an annuity for the benefit of my said son from such a Company as they shall deem best and safest.

EIGHTEENTH. I further direct in the event of the death of my said son, Conrad Morris Braker, before he shall have received the bequests made to and for him, and specified in sections Fourth, Twelfth, Fourteenth, Fifteenth and Sixteenth, then said bequests shall pass absolutely and at once to my son, Henry J. Braker, his executors and assigns, unless otherwise specified in said sections.

NINETEENTH. I further direct that the trustees of any of the above bequests may at any time sell any property or securities held by them and securely reinvest the proceeds as they shall deem best.

TWENTIETH. I direct that any one who shall dispute or contest this my last Will and Testament, shall forfeit one-half ($\frac{1}{2}$) of the legacies or benefits, they would otherwise receive under it, and the amount so forfeited shall revert to my residuary estate.

TWENTY-FIRST. I nominate, constitute and appoint my son, Henry J. Braker, and my beloved wife, Frances J. Braker, the executor and executrix of this my Last Will and Testament, and I direct that the sur-

Will of Conrad Braker, Jr.

vivor shall be empowered to appoint a co-executor and in the event of either dying or failing to serve, it is my Will that another shall be appointed at once and that no one person shall serve alone as my executor or executrix, and I direct that neither my son, Henry J. Braker, or my beloved wife, Frances J. Braker, shall be required to give any bond or bonds for the execution of their duties.

TWENTY-SECOND. I further direct that my son, Henry J. Braker, or my beloved wife, Frances J. Braker, in the event of the death of either shall individually be empowered to appoint a co-trustee, wherein they are named as such in this my Last Will and Testament.

IN WITNESS WHEREOF, I, the said Conrad Braker, Jr., have hereunto set my hand and seal this Twentieth day of February, One thousand eight hundred and ninety.

C. BRAKER, JR.

Signed, sealed, published and declared, by the said testator as and for his last Will and Testament, in the presence of us and each of us, who in his presence, at his request, and in the presence of each other have hereunto subscribed our names as attesting witnesses this twentieth day of February, One thousand eight hundred and ninety.

AUSTIN L. FLETCHER,

Murray Hill Hotel, Park Ave., N. Y. City.

J. ARTHUR HARRATT,

645 Madison Ave., N. Y. City.

G. OLNEY BLOTT,

114 West 49th St., N. Y. City.

Assignment—Braker to Rabe

"B."

ASSIGNMENT—BRAKER TO RABE.

WHEREAS, Conrad Braker, Jr., late of the City, County and State of New York, departed this life on or about the 21st day of July, 1890, A. D., having first made and published his last Will and Testament in writing, bearing date the Twentieth day of February, A. D., 1890, and which was thereafter duly admitted to probate by the Surrogate of the County of New York, and recorded in his Office in Book of Wills, No. 435, page 383, etc., and

WHEREAS, wherein and whereby the said Will, the said Conrad Braker, Jr., did inter alia, will as follows:

"FOURTEENTH. Out of the above said other one-half of all the rest, residue and remainder of my estate, both real and personal, wheresoever situated, I give and bequeath to Henry J. Braker, the sum of Fifty Thousand (\$50,000) Dollars, and I direct that the same shall be paid to him within nineteen months from the date of my decease, and that he shall hold the same IN TRUST and securely invest it for the special benefit of my son, Conrad Morris Braker, and I direct that the interest or increase on the same or on such amount as shall be unpaid as hereinafter set forth, shall be paid to him quarterly, so long as he shall live. But I further direct that if he be living at the expiration of ten years from the date of my decease, that the said Trustees shall pay to my said son, Conrad Morris Braker, the sum of Twenty Thousand (\$20,000) Dollars of said principal, together with any accrued and unpaid interest, should there be any, and the same shall be and belong to him absolutely.

Should my said son be living at the expiration of fifteen years from the date of my decease, I direct that he shall be paid the further sum of Twenty Thousand

Assignment—Braker to Rabe

(\$20,000) Dollars, together with any accrued and unpaid interest on the said remaining Thirty Thousand (\$30,000) Dollars, and the same shall be and belong to him absolutely.

Should my said son be living at the expiration of twenty years, from the date of my decease, I direct that the remaining Ten Thousand (\$10,000) Dollars of the above mentioned sum, together with any accrued and unpaid interest on the said remaining Ten Thousand (\$10,000) Dollars shall be paid to him, and the same shall be and belong to him absolutely," and

WHEREAS, by an Order and Decree of the Surrogate's Court, New York County, entered the Sixteenth day of November, A. D., 1897, Austin B. Fletcher was appointed as Testamentary Trustee for the said Conrad Morris Braker under the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker, and to execute the unexecuted trusts of which Henry J. Braker was Trustee, under the above recited Last Will and Testament; and

WHEREAS, by a recent account rendered by the said Austin B. Fletcher of his proceedings as such Testamentary Trustee of the said Conrad Morris Braker to October 1st, 1900, and filed in the Surrogate's Court, New York County, IT IS SHOWN that the sum of Twenty Thousand (\$20,000) Dollars has been paid to the said Conrad Morris Braker on account of the legacy mentioned in the "Fourteenth" Clause of the said Will, and that the said Trustee holds and has invested for the said Conrad Morris Braker the balance of the said legacy of Fifty Thousand (\$50,000) Dollars, to-wit: Thirty Thousand (\$30,000) Dollars, and

WHEREAS, by a certain instrument in writing, bearing date of January 25th, 1901, the said Conrad Morris Braker assigned to one Mehry R. Loeb, a certain part of the legacy of Fifty Thousand (\$50,000) Dollars to

Assignment—Braker to Rabe

the said Conrad Morris Braker under the aforementioned "Fourteenth" Clause of the said Will, to-wit: the Twenty Thousand (\$20,000) Dollars thereof, which is to be paid to the said Conrad Morris Braker on the 21st day of July, 1905, if he shall then be living, such assignment being made as collateral security for the re-paying of a certain loan of Five Thousand (\$5,000) Dollars, and interest; and

WHEREAS, by a certain instrument in writing, bearing date of February 7th, 1901, the said Mehry R. Loeb, did release to the said Conrad Morris Braker a one undivided half share or interest in and to the said legacy of Twenty Thousand (\$20,000) Dollars; and

WHEREAS, by a certain instrument in writing, bearing date of February 11th, 1901, the said Conrad Morris Braker did assign to one William H. Sage, a certain one other part of the said legacy of Fifty Thousand (\$50,000) Dollars, to the said Conrad Morris Braker, under the aforementioned "Fourteenth" Clause of the said Will, to-wit: one-half of the legacy of Twenty Thousand (\$20,000) Dollars, which is to be paid to the said Conrad Morris Braker on the 21st day of July, 1905, if he then be living, out of which said Ten Thousand (\$10,000) Dollars the said Sage is to retain the Eight Thousand (\$8,000) Dollars purchase price of the said interest in the said legacy, the remaining Two Thousand (\$2,000) Dollars to be returned and repaid to the said Conrad Morris Braker, less any expense the said Sage may have incurred in reducing the said Eight Thousand (\$8,000) Dollars of said legacy to possession; and

WHEREAS, the said Conrad Morris Braker is still living and has attained the age of Forty-three years:

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that I, Conrad Morris Braker, of Stamford, Fairfield County, State of Connecticut, son of the above

Assignment—Braker to Rabe

named Testator, Conrad Braker, Jr., and devisee named in his Will as hereinbefore more particularly recited, for and in consideration of the sum of One Dollar lawful money of the United States of America, to me in hand well and truly paid, at and before the sealing and delivery hereof by Frank L. Rabe, of the City of Philadelphia, and State of Pennsylvania, the receipt of all of this is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto the said Frank L. Rabe his heirs, executors, administrators and assigns forever, any and all my estate, right, title and interest, of, in and to the principal sum of Fifty Thousand (\$50,000) Dollars, to which I am entitled under and by virtue of the "Fourteenth" Clause of the said Last Will and Testament of the said Conrad Braker, Jr., deceased, as hereinbefore recited, TO HAVE AND TO HOLD the same unto the said Frank L. Rabe, his heirs, executors, administrators and assigns from henceforth, to and for his and their own proper use and benefit forever, and subject only to the payment of the aforementioned sum of Five Thousand (\$5,000) Dollars to Mehry R. Loeb with interest from January 25th, 1902; and the aforementioned sum of Eight Thousand (\$8,000) Dollars to William H. Sage, together with his expenses in the collection of the same; as by the several assignments hereinbefore recited to the said LOEB and SAGE is provided for.

AND I Do HEREBY constitute and appoint the said Frank L. Rabe my true and lawful attorney, irrevocable, with full power of substitution of other attorneys under him, and give and grant to him, his heirs, executors, administrators or assigns, full power and authority in my name or in the name of my executors or administrators to ask, demand, sue for, recover and

Assignment—Braker to Rabe

receive the said right, title, interest, legacies, gifts and estate hereinbefore mentioned and particularly set forth, and to compound, acquit, release and discharge the same. I hereby ratifying and confirming all and whatever he or they shall lawfully do or cause to be done in or about the premises.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 13th day of June, in the year One Thousand and Nine Hundred and One.

CONRAD MORRIS BRAKER, L. S.

Sealed and delivered
in the presence of:

WILLIAM H. COCHRAN,
EDWARD A. PFEFFER.

RECEIVED the day of the date of the foregoing Assignment and Power of Attorney of the within named Frank L. Rabe, the sum of One Dollar being the full consideration money within mentioned.

CONRAD MORRIS BRAKER.

Witness at signing:

EDWARD A. PFEFFER.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } ss.:

On the 13th day of June, A. D., 1901, before me the subscriber, personally came Conrad Morris Braker, to me known and known to me to be the individual mentioned in and who executed the foregoing Assignment and Power of Attorney, and acknowledged to me that he executed and delivered the same for the purposes therein set forth.

EDWARD A. PFEFFER,
Notary Public, 26, New York County.

Assignment—Braker to Rabe

“C.”

ASSIGNMENT—BRAKER TO RABE.

WHEREAS, Conrad Braker, Jr., late of the City County and State of New York, departed this life on or about the 21st day of July, A. D., 1890, having first made and published his Last Will and Testament in writing bearing date the twentieth day of February, A. D., 1890, duly proven and registered after his decease in the County of New York in the proper office therefor and recorded therein in Will Book No. 435, page 383, etc., wherein and whereby he did, inter alia, will as follows:

FIFTEENTH. “Out of the said other one-half of all the rest, residue and remainder of my estate, both real and personal, wheresoever situated, I give and bequeath to my son, Henry J. Braker, the further sum of Fifty Thousand Dollars (\$50,000) and I direct that the same shall be paid to him within three years from the date of my decease, and that he shall hold the same IN TRUST and securely invest it for the benefit of my said son, Conrad Morris Braker, paying him the interest derived from the same semi-annually from the date of my decease until he shall attain the age of fifty-five years, when I direct that the principal and any unpaid interest shall be paid to him and belong to him absolutely.

“In the event of the death of my said son, Conrad Morris Braker, before he attains the age of Fifty-five years, I direct that the income derived from the said Fifty Thousand Dollars (\$50,000) shall be paid semi-annually to Florence L. Braker, wife of my said son, Conrad Morris Braker, so long as she shall live and remains unmarried. In the event of her marriage or death, I direct that the said Fifty Thousand Dollars

Assignment—Braker to Rabe

(\$50,000) shall be given to my grandchild, Florence May Braker, if she then be living and if she be not living, then the said Fifty Thousand Dollars shall be paid to my son, Henry J. Braker, if he should be living, if he be dead, I direct that it sink into my residuary estate."

SIXTEENTH. "I direct that all that remains out of the above said 'other one-half of all the rest, residue and remainder, both real and personal wheresoever situated', after the bequests made in sections twelfth, thirteenth, fourteenth and fifteenth shall have been provided for, shall be held IN TRUST by my wife, Frances J. Braker, and my son, Henry J. Braker, and their duly appointed successors for the benefit of my said son, Conrad Morris Braker, until he shall attain the age of Fifty-five years, and I direct that the interest derived from said Trust shall be paid to him semi-annually and when he shall have attained the age of fifty-five years, I direct that the whole amount less the sum of Twenty-five thousand Dollars shall be paid and belong to him absolutely."

WHEREAS, at a Surrogate's Court held in and for the County of New York on the Sixteenth day of November, A. D., 1897, and by virtue of an order and decree rendered by said Court, Austin B. Fletcher was appointed as Testamentary Trustee for the said Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker, and to execute the unexecuted Trusts of which Henry J. Braker was Trustee, under the above recited Last Will and Testament.

WHEREAS, by a recent account rendered by the said Austin B. Fletcher of his proceedings as such Testamentary Trustee of the said Conrad Morris Braker to October 1st, 1900, and filed in the Surrogate's Court of the County of New York, it is shown that the Fifty Thousand Dollars (\$50,000) mentioned in Clause Fif-

Assignment—Braker to Rabe

teen of said Will has been duly invested as therein provided for, and that a sum aggregating One Hundred and Twenty Thousand, Seven Hundred and Thirty-one Dollars and Five cents has been invested with the exception of a small portion thereof, for the use and benefit of the said Conrad Morris Braker as provided for in Clause Sixteen of said Will.

WHEREAS, the said Conrad Morris Braker is still living, and has attained the age of 43 years.

NOW, KNOW ALL MEN BY THESE PRESENTS, that I, Conrad Morris Braker, of Stamford, Fairfield County, State of Connecticut (son of the above named testator, and devisee as hereinbefore recited) for and in consideration of the sum of One Dollar lawful money of the United States of America to me in hand well and truly paid at and before the sealing and delivery hereof by Frank L. Rabe, of the City of Philadelphia, and State of Pennsylvania, Attorney-at-law, the receipt of all of which is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over and by these presents do grant, bargain, sell, assign, transfer and set over unto the said Frank L. Rabe, his heirs, executors, administrators and assigns, seven-tenths of all my estate, right, title and interest of, in and to the principal sum of \$50,000 to which I am entitled under and by virtue of the conditions of Clause Fifteen in the Last Will and Testament of the said Conrad Braker, Jr., deceased, as hereinbefore recited, and to no other part or portion of said estate whatever; so, however, and it is my intention, that the said Frank L. Rabe, his heirs, executors, administrators and assigns shall receive, by virtue of this assignment, the net sum of Thirty-five Thousand Dollars when and as soon hereafter as the same shall grow due and become payable, PROVIDED, HOWEVER, that should the said Trust Fund as created by the Fifteenth clause of said Will, at any

Assignment—Braker to Rabe

time hereafter be diminished by reason of any cause or thing whatsoever, whereby the said principal sum of \$50,000 should be reduced so that the assignee hereto, or his heirs, executors, administrators or assigns might not receive the said sum of Thirty-five Thousand Dollars, then, and in such case, I hereby assign, transfer and set over unto the said Frank L. Rabe, his heirs, executors, administrators or assigns so much of all my estate, right, title and interest of, in and to that portion of the principal sum to which I am entitled under the conditions of Clauses Fifteen and Sixteen in said Will, as may be necessary to make up any such deficiency, so, however, and I do by these presents, for myself, my heirs, executors, and administrators, covenant, grant and agree to and with the said Frank L. Rabe, his heirs, executors, administrators and assigns, that he, the said Frank L. Rabe, his heirs, executors, administrators and assigns shall and will as hereinbefore declared and set forth, receive the net sum of Thirty-five Thousand Dollars when and as soon as the said principal sum of \$50,000 shall become due and payable under and by virtue of the provisions and conditions set forth and declared in and by the Fifteenth clause of the said Last Will and Testament of the said Conrad Braker, Jr., deceased; To HAVE AND TO HOLD the same unto the said Frank L. Rabe, his heirs, executors, administrators and assigns from henceforth to and for his and their own proper use and benefit forever.

AND I DO HEREBY constitute and appoint the said Frank L. Rabe, my true and lawful attorney, irrevocable, with full power of substitution of other attorneys under him, and give and grant to him, his heirs, executors, or administrators, full power and authority in my name or in the name of my executors or administrators, to ask, demand, sue for, recover and receive the said right, title, interest, legacies, gifts and estate

Assignment—Braker to Rabe

hereinbefore mentioned and particularly set forth, and to compound, acquit, release and discharge the same; I hereby ratifying and confirming all and whatever he or they shall lawfully do or cause to be done in or about the premises.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 18th day of April, A. D., 1901.

(Stamp)

CONRAD MORRIS BRAKER, L. S.

Sealed and delivered in
the presence of us:

CHARLES B. HELFFRICH,
JAMES P. J. MORRIS.

RECEIVED the day of the date of the foregoing Assignment and Power of Attorney of the within named Frank L. Rabe, the sum of One Dollar being the full consideration money within mentioned.

CONRAD MORRIS BRAKER.

Witnesses at signing:

CHAS. B. HELFFRICH,
JAMES P. J. MORRIS.

STATE OF NEW YORK,
CITY & COUNTY OF NEW YORK, } ss.:

On the 18th day of April, A. D., 1901, before me the subscriber, personally came CONRAD MORRIS BRAKER, to me known and known to me to be the individual mentioned in and who executed the foregoing Assignment and Power of Attorney and acknowledged to me that he executed and delivered the same for the purposes therein set forth.

JAMES P. J. MORRIS,
Notary Public, N. Y. Co.

Assignment—Rabe to N. Y. F. Co.

“D”

ASSIGNMENT—RABE TO N. Y. F. CO.

WHEREAS, Conrad Morris Braker by an Assignment and Power of Attorney, bearing date the Eighteenth day of April, A. D., 1901, and recorded in the Office of the Register of the County of New York in Liber 4 of Miscellaneous Instruments page 74, etc., did grant, bargain, sell, assign, transfer and set over seven-tenths of all his estate, right, title and interest of in and to the principal sum of Fifty Thousand (\$50,000) Dollars to which he is entitled under and by virtue of the conditions of Clause “Fifteen” in the Last Will and Testament of Conrad Braker, Jr., deceased, unto Frank L. Rabe, his heirs, executors, administrators and assigns forever.

AND WHEREAS, the said Conrad Morris Braker by an Assignment and Power of Attorney bearing date the Thirteenth day of June, A. D., 1901, and recorded in the Office of the Register of the County of New York in Liber No. 4 of Miscellaneous Instruments,, page 125, etc., did grant, bargain, sell, assign, transfer and set over all his estate, right, title and interest of and to the principal sum of Fifty Thousand (\$50,000) Dollars, to which he is entitled under and by virtue of the “Fourteenth” Clause under the Will of the said Conrad Braker, Jr., deceased, unto Frank L. Rabe, his heirs, executors and administrators and assigns forever.

NOW, KNOW ALL MEN BY THESE PRESENTS, that I, Frank L. Rabe, of the City of Philadelphia (Assignee as above recited) for and in consideration of the sum of Ten Thousand Dollars lawful money of the United States of America, unto me in hand well and truly paid at and before the sealing and delivery hereof by the New York Finance Company, a corporation duly

Assignment—Rabe to N. Y. F. Co.

organized and existing under the laws of the State of New York, the receipt whereof is hereby acknowledged have granted, bargained, sold, assigned, transferred and set over, and by these presents do grant, bargain, sell, assign, transfer and set over unto the said New York Finance Company, its successors and assigns, all my estate, right, title and interest of, in and to the interest of Conrad Morris Braker under Clause "Fifteen" in the Will of Conrad Braker, Jr., deceased, as well as all my right, title and interest of, in and to the interest of Conrad Morris Braker under Clause "Fourteen" in the Will of the said Conrad Braker, Jr., deceased, and of all and every part or parcel thereof; TO HAVE AND TO HOLD unto the said New York Finance Company, its successors and assigns from henceforth to and for their own proper use and benefit forever.

AND I Do HEREBY constitute and appoint the said New York Finance Company my true and lawful attorney, irrevocable with full power of substitution of other attorneys under them, and give and grant to them, their successors and assigns, full power and authority in my name or in the name of my executors and administrators to ask, demand, sue for, recover and receive the said right, title, interest, legacies, gifts and estate hereinbefore mentioned and set forth, and to compound, acquit, release and discharge the same, I hereby ratifying and confirming all and whatsoever they shall lawfully do or cause to be done in or about the premises.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this First day of October, A. D., 1901.

FRANK L. RABE (Seal)

Sealed and delivered
in the presence of:

FRANCIS S. GINTHER,
GRACE R. RAU.

Assignment—Rabe to N. Y. F. Co.

STATE OF PENNSYLVANIA, }
 COUNTY OF PHILADELPHIA, }

On the Eleventh day of October, A. D., 1901, before me, the subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared the within named Frank L. Rabe, and in due form of law acknowledged the above written assignment and Power of Attorney to be his act and deed and desired the same might be recorded as such.

WITNESS my hand and Notarial Seal the day and year aforesaid.

FRANCIS S. GINTHER,
 (Seal) *Notary Public.*

Commission expires January 19, 1903.

(County Clerk's Certificate attached.)

"E"

ASSIGNMENT—RABE TO N. Y. F. CO.

WHEREAS, heretofore, and by a certain instrument in writing, bearing date the 18th day of April, 1901, one CONRAD MORRIS BRAKER, did assign and transfer unto one FRANK L. RABE, a seven-tenths part of the certain principal sum of \$50,000, to which the said Conrad Morris Braker was entitled under and by virtue of Clause Fifteen in the Last Will and Testament of one Conrad Braker, Jr., deceased, it being, however, further provided by the said instrument, that should the fund created by the said Fifteenth Clause of the said Will, be by any cause or reason diminished or reduced below the said sum of \$50,000, so that the said Frank L. Rabe might not receive

Assignment—Rabe to N. Y. F. Co.

the net sum of \$35,000, intended to be assigned and transferred to him as aforesaid, that then and in that event, the said Conrad Morris Braker did assign and transfer unto the said Frank L. Rabe so much of the principal sum to which he, the said Conrad Morris Braker, was entitled under Clauses Fifteen and Sixteen in the aforementioned Will of Conrad Braker, Jr., deceased, as might be necessary to make up any deficiency, so that the said Frank L. Rabe should receive the aforementioned net sum of \$35,000; all of which by the aforementioned instrument more fully and at large appears; and

WHEREAS, heretofore, and by a certain other instrument in writing, bearing date the 13th day of June, 1901, the aforesaid Conrad Morris Braker did also assign and transfer unto the aforesaid Frank L. Rabe, any and all his right, title and interest in and to the principal sum of \$50,000, to which the said Conrad Morris Braker was entitled under and by virtue of the "Fourteenth" Clause of the aforementioned Last Will and Testament of Conrad Braker, Jr., deceased, subject only to the payment of the certain aggregate sum of \$13,000 therefrom, as by the aforementioned instrument will also more fully and at large appear; and

WHEREAS, heretofore, and by a certain instrument in writing, bearing date the First day of October, 1901, the aforementioned Frank L. Rabe, did assign and transfer unto New York Finance Company, all and every his Estate, right, title and interest in and to the Estate of the aforementioned Conrad Braker, Jr., deceased, so assigned and transferred to him by Conrad Morris Braker as hereinbefore recited and set forth; and

WHEREAS, by inadvertence and mistake, the last

Assignment—Rabe to N. Y. F. Co.

mentioned assignment from Frank L. Rabe to New York Finance Company did not particularly refer to the right, title and interest acquired by the said Frank L. Rabe in and to the Estate of the aforesaid Conrad Braker, Jr., deceased, under the Sixteenth clause of his Last Will and Testament, and duly assigned to the said Frank L. Rabe by the aforesaid Conrad Morris Braker on April 18th, 1901, as hereinbefore particularly recited and set forth, although it was the intention of the parties thereto, that such interest was included in and was assigned by the said Frank L. Rabe to the said New York Finance Company, by the said instruments; and

WHEREAS, to prevent difficulties and misunderstandings hereafter, it is expedient to correct such error and omission, if any there be:

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that I, the aforementioned Frank L. Rabe, for and in consideration of the premises, and also of the sum of One Dollar to me in hand duly paid, at and before the sealing and delivery of these presents, by the New York Finance Company, a corporation organized and existing under and by virtue of the Laws of the State of New York, and the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do hereby grant, bargain, sell, assign, transfer and set over unto the said New York Finance Company, its successors and assigns FOREVER all and every my estate, right, title and interest of any kind, form, and description whatsoever, in and to the Estate of Conrad Braker, Jr., deceased, and particularly in and to all moneys coming to me under the 14th, 15th and 16th Clauses of the Last Will and Testament of the said Conrad Braker, Jr., deceased, so assigned and transferred to

Assignment—Rabe to N. Y. F. Co.

me by Conrad Morris Braker, by the two certain instruments of assignment, dated respectively the 18th day of April, 1901, and June 12th, 1901, and hereinbefore more particularly referred to and set forth; To HAVE AND TO HOLD the same unto the said New York Finance Company, its successors and assigns to and for its and their own proper use and benefit forever; this instrument being given to correct any mistakes, omissions, or ambiguity, if any there be, in the aforementioned assignment between the said parties, dated October 1st, 1901.

AND I Do HEREBY constitute and appoint the said New York Finance Company my true and lawful Attorney irrevocable, with full power of substitution of other Attorneys under them, and give and grant to them, their Successors and Assigns, full power and authority in my name or in the name of my Executors and Administrators to ask, demand, sue for, recover and receive the said right, title interest, legacies, gifts and estate hereinbefore mentioned and set forth, and to compound, acquit, release and discharge the same, I hereby ratifying and confirming all and whatsoever they shall lawfully do or cause to be done in or about the premises.

IN WITNESS WHEREOF I have hereunto set my hand and seal, this 4th day of January, A. D., 1907.

FRANK L. RABE, L. S.

Sealed and delivered
in the presence of:

GEORGE KOPPENHOEFER, JR.,
M. McLAUGHLIN.

On the 4th day of January, A. D., 1907, before me, the subscriber, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia,

Promissory Note—N. Y. F. Co.

personally appeared the within named Frank L. Rabe and in due form of law acknowledged the above written Assignment and Power of Attorney to be his Act and Deed and desired the same might be recorded as such.

WITNESS my hand and Notarial Seal, this day and year aforesaid.

(Seal) GRACE C. FISHER,
Notary Public.

Commission expires Jan. 18, 1907.

(County Clerk's Certificate attached).

"F"

PROMISSORY NOTE—N. Y. F. CO.

New York City, N. Y., Dec. 19, 1906.

On July 21st, 1910, for value received, the NEW YORK FINANCE COMPANY, promises to pay to the order of JOHN A. S. BROWN, and of FRANK E. SCHERMERHORN as Trustee for Clara Schermerhorn under the Last Will and Testament of Thomas Cunningham, deceased, at No. 11 Broadway, Borough of Manhattan, City of New York, the sum of Ten Thousand (\$10,000) Dollars, together with interest thereon at the rate of six per cent. per annum, payable semi-annually, having pledged herewith as collateral security (1) a certain part of all its right, title and interest in and to the estate of Conrad Braker, Jr., deceased, as by the certain assignment bearing even date herewith will more fully and at large appear, and (2) two certain Policies of Insurance of the Equitable Life Assurance Society of the United States, upon the life of one Conrad Morris Braker, also duly assigned of even date herewith.

And upon the non-performance of this promise, or upon default in the payment of any interest on the said

Assignment—N. Y. F. Co. to Brown & Schermerhorn

loan for the space of fifteen days after the same shall become due and payable, it hereby authorizes and empowers the holder of this note to sell any and all of the certain part of all the right, title and interest of the said New York Finance Company in and to the aforementioned estate of Conrad Braker, Jr., deceased, as is particularly described in the aforementioned assignment, at public or private sale at the option of the holders hereof, and with or without notice; and to apply the proceeds, or so much thereof, as may be necessary to the payment of this note, and of all necessary legal, or other costs and expenses, including counsel fees and other charges connected with the collection hereof, and the sale and delivery of the said interest, holding the said New York Finance Company responsible for any deficiency, which it hereby undertakes and agrees to pay, and accounting to the said New York Finance Company for the surplus, if any: with the privilege to the holder of this note to become the purchaser at such sale, if any be had.

NEW YORK FINANCE COMPANY,

By ARTHUR W. DEPUE,

(Seal)

President.

—
“G”

ASSIGNMENT—N. Y. F. CO. TO BROWN
AND SCHERMERHORN.

WHEREAS, the New York Finance Company has this day made and given to John A. S. Brown and to Frank E. Schermerhorn as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, its certain promissory note for the payment of Ten Thousand (\$10,000) Dollars on the 21st day of July, 1910; and

Assignment—N. Y. F. Co. to Brown & Schermerhorn

WHEREAS, heretofore and by two certain instruments in writing bearing date of April 18th, 1901, and June 13th, 1901, respectively, one Conrad Morris Braker did grant, bargain, sell, assign, transfer and set over to one Frank L. Rabe certain of his estate, right, title and interest in and to the certain legacies coming to him under and by virtue of the "Fourteenth", "Fifteenth", and "Sixteenth" paragraphs respectively of the Last Will and Testament of Conrad Braker, Jr., deceased, as by the said assignments will more particularly and at large appear; and

WHEREAS, the said Frank L. Rabe by a certain instrument in writing bearing date of October 1st, 1901, did assign, transfer and set over to the aforementioned New York Finance Company any and all his aforementioned estate, right, title and interest in and to the estate of the said Conrad Braker, Jr., deceased, as hereinbefore more particularly recited, and as by the last mentioned assignment from the said Frank L. Rabe to the said New York Finance Company will also more fully and at large appear;

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that the New York Finance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, for and in consideration of the sum of One Dollar to it in hand well and truly paid at and before the sealing and delivery hereof, by John A. S. Brown and by Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, and the receipt whereof is hereby acknowledged, and for the purpose of securing to the said John A. S. Brown and the said Frank E. Schermerhorn as Trustee aforesaid, payment of the aforesaid note, together with the interest thereon, has bargained, granted, sold, assigned, transferred and set

Assignment—N. Y. F. Co. to Brown & Schermerhorn

over, and by these presents does hereby grant, bargain, sell, assign, transfer and set over unto the said John A. S. Brown and the said Frank E. Schermerhorn as Trustee for Clara Schermerhorn, under the Last Will of Thomas Cunningham, deceased, their and each of their executors, administrators, successors and assigns, any and all monies coming to it under and by virtue of the aforementioned assignment bearing date of June 13th, 1901, and also a one-half part of any and all monies coming to it under and by virtue of the aforementioned assignment bearing date of April 18th, 1901, and duly assigned to the said New York Finance Company as hereinbefore particularly recited and set forth, and also all and every its estate, right, title and interest in and to such monies, or any part thereof; To HAVE AND TO HOLD the same unto the said John A. S. Brown and the said Frank E. Schermerhorn as Trustee aforesaid, their and each of their executors, administrators, successors and assigns, to and for their and each of their own proper use and benefit forever; provided, however, that if the said New York Finance Company shall well and truly pay or cause to be paid unto the said John A. S. Brown and the said Frank E. Schermerhorn as Trustee aforesaid, its certain note hereinbefore referred to, together with the interest thereon, or any note or notes which may be given in renewal thereof, then this assignment shall be null and void and the estate hereby created shall cease and determine.

And the said New York Finance Company does hereby appoint the said John A. S. Brown and Frank E. Schermerhorn its true and lawful attorneys, irrevocable, with full power of substitution of other attorneys under them and each of them, and give and grant to them and each of them, their and each of their executors, administrators, successors and as-

Assignment—N. Y. F. Co. to Brown & Schermerhorn

signs, full power and authority in its name, or in the name of its successors or assigns, to ask, demand, sue for, recover and receive the said right, title, interest, legacies and estate hereinbefore mentioned and particularly set forth, and to compound, acquit, release and discharge the same; it hereby ratifying and confirming all and whatever they or either of them shall lawfully do, or cause to be done in or about the premises.

IN WITNESS WHEREOF, the said New York Finance Company has hereunto signed its name, and caused the same to be signed by its President, and its corporate seal to be hereunto affixed, this 19th day of December, 1906.

NEW YORK FINANCE COMPANY,

ARTHUR W. DEPUE,

(Seal)

President.

STATE OF NEW YORK, } ss.:
COUNTY OF NEW YORK,

On the 19th day of December, in the year One Thousand and Nine Hundred and Six, before me personally came ARTHUR W. DEPUE, to me known, who being by me duly sworn, did depose and say: that he resides in the City of New York; that he is the President of the NEW YORK FINANCE COMPANY, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name thereto by like order.

C. STANLEY MITCHELL,

Notary Public, N. Y. County, No. 193.

Assignment—Brown, et al., to Wolff

“H”

ASSIGNMENT—BROWN ET AL. TO WOLFF.

WHEREAS, heretofore, and on the 19th day of December, 1906, the New York Finance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, did make and deliver unto John A. S. Brown, and to Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, its certain promissory note, bearing date the said 19th day of December, 1906, and providing for the payment of the said sum of Ten Thousand Dollars (\$10,000) on the 21st day of July, 1910, together with interest thereon at the rate of 6% per annum, payable semi-annually, at No. 11 Broadway, Borough of Manhattan, City of New York, and as security for the payment of the said Note did also make, execute and deliver unto the said John A. S. Brown, and unto Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, an assignment of the certain part of all the right, title and interest of the New York Finance Company, in and to the estate of Conrad Braker, Jr., deceased, to-wit: a one-half part of the certain estate, right, title and interest, and any and all moneys coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of April 18th, 1901; and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company, by a certain instrument in writing, bearing the date of October 1st, 1901: and also the certain part of all the right, title and interest of the New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to-wit: the certain estate,

Assignment—Brown, et al., to Wolf

right, title and interest, and any and all moneys coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of June 13th, 1901; and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain instrument in writing, bearing the date of October 1st, 1901, as by the certain assignment bearing date the said 19th day of December, 1906, will more fully and at large appear; and

WHEREAS, in and by the certain promissory Note it is provided, inter alia, as follows, to-wit:

“And upon the non-performance of this promise, or upon default in the payment of any interest on the said loan for the space of fifteen days after the same shall become due and payable, it hereby authorizes and empowers the holder of this Note to sell any and all of the certain part of all the right, title and interest of the said New York Finance Company, in and to the aforementioned estate of Conrad Braker, Jr., deceased, as is particularly described in the aforementioned assignment, at public or private sale at the option of the holders hereof, and with or without notice; and to apply the proceeds, or so much thereof, as may be necessary to the payment of this note, and of all necessary legal, or other costs and expenses, including counsel fees and other charges connected with the collection hereof, and the sale and delivery of the said interest, holding the said New York Finance Company responsible for any deficiency, which it hereby undertakes and agrees to pay, and accounting to the said New York Finance Company for the surplus, if any: with the privilege to the holder of this note to become the purchaser at such sale, if any be had.”

AND WHEREAS, the said New York Finance Company did default in the said promise, to-wit, in the pay-

Assignment—Brown, et al., to Wolff

ment of the said sum of \$10,000 and in the payment of certain interest due thereon for more than Fifteen days after the same became due and payable, and after requests and demands for the payment thereof, failed, neglected and refused to make payment thereof; and

WHEREAS, the said John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, being the holders of the said Note, did on the 3rd day of May, 1911, cause the aforementioned collateral to the said Note to be sold at Public Sale by Messrs. Barnes & Lofland, auctioneers, in the City of Philadelphia, State of Pennsylvania, freed and discharged from any equity of redemption, to Charles Z. Wolff for the sum of Two Thousand Dollars (\$2,000.00) the said Charles Z. Wolff being the highest bidder, and that being the highest bid therefor.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that we, the aforementioned John A. S. Brown, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, for and in consideration of the aforementioned sum of Two Thousand Dollars (\$2,000.00), to us in hand paid, and the receipt whereof is hereby acknowledged, and also pursuant to such aforementioned sale, have granted, bargained, sold, assigned, transferred and set over, and by these presents do hereby grant, bargain, sell, assign, transfer and set over unto the aforementioned Charles Z. Wolff, his executors, administrators and assigns, the certain part of all the right, title and interest of the New York Finance Company, in and to the estate of Conrad Braker, Jr., deceased, to-wit: a one-half part of the certain estate, right, title and interest, and any and all moneys coming to the said New York Finance Company therefore, assigned and transferred by Conrad

Assignment—Brown, et al., to Wolff

Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of April 18th, 1901, and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain instrument in writing, bearing the date of October 1st, 1901; and also the certain part of all the right, title and interest of the New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to-wit: the certain estate, right, title and interest, and any and all moneys coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of June 13th, 1901, and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain instrument in writing, bearing the date of October 1st, 1901, as by the certain assignment bearing date the said 19th day of December, 1906, will more fully and at large appear, freed and discharged from any equity of redemption.

TO HAVE AND TO HOLD THE SAME, unto the said Charles Z. Wolff, his executors, administrators and assigns forever.

And the said John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, hereby constitute and appoint the said Charles Z. Wolff their true and lawful attorney, irrevocable, with full power of substitution of other attorneys under him, and give and grant to him, his successors and assigns, full power and authority in their name, to ask, demand, sue for, recover and receive the aforementioned interest in the estate of Conrad Braker, Jr., deceased, and any and all moneys payable thereunder as hereinbefore particularly mentioned and set forth, and to compound, acquit, release and dis-

Assignment—Brown, et al., to Wolf

charge the same, they hereby ratifying and confirming all and whatsoever he or they shall lawfully do or cause to be done in or about the premises.

IN WITNESS WHEREOF, the said John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, have hereunto set their respective hands and seals, this Sixth day of May, A. D., 1911.

JNO. A. S. BROWN, (Seal)
FRANK E. SCHERMERHORN,

As Trustee for Clara Schermerhorn, Under the Last Will and Testament of Thomas Cunningham, Deceased.

Signed, sealed and delivered in the presence of:

(Seal)

GEORGE KOPPENHOEFER, JR.,
RAYMOND C. KARGE.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } ss.:

On this Sixth day of May, A. D., 1911, before me, the subscriber, personally came and appeared JOHN A. S. BROWN, to me known, and known to me to be one of the persons described in and who executed the foregoing instrument, and in due form of law acknowledged to me that he executed the same as and for his voluntary act and deed.

WITNESS my hand and Notarial seal, the day and year aforesaid.

GEORGE KOPPENHOEFER, JR.,
(Seal) Notary Public.

My commission expires March 10, 1913.

Assignment—Wolff to Brown

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } ss.:

On this Sixth day of May, A. D., 1911, before me, the subscriber, personally came and appeared FRANK E. SCHERMERHORN, to me known, and known to me to be one of the persons described in and who executed the foregoing instrument, and in due form of law acknowledged to me that he executed the same as Trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased.

WITNESS my hand and Notarial seal, the day and year aforesaid.

GEORGE KOPPENHOEFER, JR.,
(Seal) *Notary Public.*

My commission expires March 10, 1913.

(County Clerk's Certificate attached.)

"I"

ASSIGNMENT—WOLFF TO BROWN, ET AL.

WHEREAS, heretofore, and on the 19th day of December, 1906, the New York Finance Company, a corporation organized and existing under and by virtue of the laws of the State of New York, did make and deliver unto John A. S. Brown, and to Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, its certain promissory note, bearing date the said 19th day of December, 1906, and providing for the payment of the said sum of Ten Thousand Dollars (\$10,000) on the 21st day of July, 1910, together with interest thereon at the rate of six per cent. per annum, payable semi-annually, at No. 11 Broadway, Borough of Manhattan, City of New York;

Assignment—Wolff to Brown, et al.

and as security for the payment of the said Note did also make, execute and deliver unto the said John A. S. Brown, and unto Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, an assignment of the certain part of all the right, title and interest of the New York Finance Company, in and to the estate of Conrad Braker, Jr., deceased, to wit, a one-half part of the certain estate, right, title and interest, and any and all moneys coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of April 18th, 1901; and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain instrument in writing, bearing the date of October 1st, 1901: and also the certain part of all the right, title and interest of the New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to wit: the certain estate, right, title and interest, and any and all moneys coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of June 13th, 1901; and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain instrument in writing, bearing the date of October 1st, 1901, as by the certain assignment bearing date the said 19th day of December, 1906, will more fully and at large appear; and

WHEREAS, in and by the certain promissory note it is provided, inter alia, as follows, to wit:

“And upon the non-performance of this promise, or upon default in the payment of any interest on the said loan for the space of fifteen

Assignment—Wolff to Brown, et al.

days after the same shall become due and payable, it hereby authorizes and empowers the holder of this note to sell any and all of the certain part of all the right, title and interest of the said New York Finance Company, in and to the aforementioned estate of Conrad Braker, Jr., deceased, as is particularly described in the aforementioned assignment, at public or private sale at the option of the holders hereof, and with or without notice; and to apply the proceeds, or so much thereof, as may be necessary to the payment of this note, and of all necessary legal, or other costs and expenses, including counsel fees and other charges connected with the collection hereof, and the sale and delivery of the said interest, holding the said New York Finance Company responsible for any deficiency, which it hereby undertakes and agrees to pay, and accounting to the said New York Finance Company for the surplus, if any: with the privilege to the holder of this note to become the purchaser at such sale, if any be had."

AND WHEREAS, the said New York Finance Company did default in the said promise, to wit, in the payment of the said sum of \$10,000 and in the payment of certain interest due thereon for more than Fifteen days after the same became due and payable, and after requests and demands for the payment thereof, failed, neglected and refused to make payment thereof; and

WHEREAS, the said John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, being the holders of the said Note, did on the 3rd day of May, 1911, cause the aforementioned collateral to the said note to be sold at Public Sale by Messrs. Barnes & Lofland, auctioneers, in the City of Philadelphia, State of Pennsylvania, freed and discharged from any equity of redemption, to Charles Z. Wolff for the sum of Two Thousand Dollars

Assignment—Wolff to Brown, et al.

(\$2,000.00), the said Charles Z. Wolff being the highest bidder, and that being the highest bid therefor; and

WHEREAS, the aforementioned John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, pursuant to such above-mentioned sale, and in consideration of the aforementioned sum of Two Thousand Dollars (\$2,000.00), and on the Sixth day of May, A. D., 1911, did grant, bargain, sell, assign, transfer and set over unto the said Charles Z. Wolff, his executors, administrators and assigns, all and every the estate, right, title and interest of the said New York Finance Company, in and to the aforementioned estate of Conrad Braker, Jr., deceased, which estate, right, title and interest is hereinbefore more particularly described and set forth, freed and discharged from any equity of redemption.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that I, the aforementioned Charles Z. Wolff, of the City of Philadelphia, State of Pennsylvania, for and in consideration of the sum of Two Thousand Dollars (\$2,000.00), to me in hand paid, and the receipt whereof is hereby acknowledged, have granted, bargained, sold, assigned, transferred and set over, and by these presents do hereby grant, bargain, sell, assign, transfer and set over unto John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, their and each of their respective executors, administrators, successors and assigns, all and every the estate, right, title and interest which I, the said Charles Z. Wolff now have, or hereafter may become entitled to receive, in, to or from the aforementioned estate of Conrad Braker, Jr., deceased, as hereinbefore more particularly men-

Assignment—Wolff to Brown, et al.

tioned and described, and also any and all moneys coming to me therefrom.

TO HAVE AND TO HOLD THE SAME, unto the said John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, their, and each of their respective executors, administrators, successors and assigns forever.

And the said Charles Z. Wolff hereby constitutes and appoints the said John A. S. Brown, and Frank E. Schermerhorn as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, his true and lawful attorney, irrevocable, with full power of substitution of other attorneys under them and each of them, and give and grant to them, and each of them, their and each of their respective executors, administrators, successors and assigns, full power and authority in his name, to ask, demand, sue for, recover and receive the aforementioned interest in the estate of Conrad Braker, Jr., deceased, and any and all moneys payable thereunder, as hereinbefore particularly mentioned and set forth, and to compound, acquit, release and discharge the same, I hereby ratifying and confirming all and whatsoever they or either of them shall lawfully do, or cause to be done in or about the premises.

IN WITNESS WHEREOF, I, the aforementioned Charles Z. Wolff, have hereunto set my hand and seal, this Sixth day of May, A. D., 1911.

CHARLES Z. WOLFF, (Seal)

Signed, sealed and delivered in the presence of

GEORGE KOPPENHOEFER, JR.,
RAYMOND C. KARGE.

Assignment—Wolff to Brown, et al.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } ss.:

On this Sixth day of May, A. D., 1911, before me, the subscriber, personally came and appeared Charles Z. Wolff to me known, and known to me to be the person described in and who executed the foregoing instrument, and in due form of law acknowledged to me that he executed the same as and for his voluntary act and deed.

WITNESS my hand and notarial seal, the day and year aforesaid.

GEORGE KOPPENHOEFER, JR.,
(Seal) *Notary Public.*

My commission expires March 10, 1913.

(County Clerk's Certificate attached.)

(Indorsed: "Circuit Court of the United States, Southern District of New York. John A. S. Brown, etc., and Frank E. Schermerhorn, as Trustee, etc., Complainants, versus Austin B. Fletcher, as Testamentary Trustee, etc., Defendant. Bill of Complaint. Fredric W. Frost, Solicitor for Complainants, 60 Wall Street, New York City. U. S. Circuit Court, Filed Jun. 7, 1911, John A. Shields, Clerk.")

*Affidavit and Notice of Motion for Stay*AFFIDAVIT AND NOTICE OF MOTION FOR
STAY.

CIRCUIT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schermmerhorn, as Trustee for Clara
Schermmerhorn, under the Last Will
and Testament of Thomas Cunning-
ham, deceased, and a citizen of the
State of Pennsylvania,*

versus

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker
under the Last Will and Testament
of Conrad Braker, Jr., deceased, and
a citizen of the State of New York.*

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of William P. S. Melvin, solicitor for the defendant in this action, verified November 6, 1911, and upon the Bill of Complaint and all the proceedings herein, a motion will be made at Circuit Court of the United States to be held in and for the Southern District of New York at the United States Post Office Building in the Borough of Manhattan and City of New York on the 10th day of November, 1911, at ten o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order staying the complainants in this action and all the proceedings in this Court pending the trial and determination of the action in the Supreme Court, State of New York, County of New York, in which Conrad Morris Braker is plaintiff

Affidavit and Notice of Motion for Stay

and New York Finance Company, Frank L. Rabe and Austin B. Fletcher as testamentary trustee for the said Conrad Morris Braker under the last will and testament of Conrad Braker, are defendants, and extending the time of the defendant to plead, answer or demur herein until the rule day next after the stay applied for is vacated, and granting such other relief as may seem just and equitable to the Court.

Dated New York City, Nov. 6, 1911.

Yours, etc.,

WILLIAM P. S. MELVIN,
Solicitor for the Defendant,
Office & Post Office Address,
165 Broadway, Borough of Manhattan,
New York City.

to FREDERIC W. FROST,
Solicitor for the Complainants.
60 Wall Street, New York City.

Affidavit and Notice of Motion for Stay

CIRCUIT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schmerhorn, as Trustee for Clara
Schmerhorn, under the Last Will
and Testament of Thomas Cunning-
ham, deceased, and a citizen of the
State of Pennsylvania,*

versus

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker
under the Last Will and Testament
of Conrad Braker, Jr., deceased, and
a citizen of the State of New York.*

CITY, COUNTY AND
STATE OF NEW YORK, } ss.:

WILLIAM P. S. MELVIN, being duly sworn, says that he is an attorney having an office at 165 Broadway, Borough of Manhattan, New York City; that this action was commenced by the service of a subpoena on the defendant on October 4, 1911; that deponent has appeared as solicitor for said defendant; that it appears by an examination of the Bill of Complaint herein that this is an action brought by the complainants to recover of the defendant the sum of \$10,000.00 upon a cause of action which will more fully appear by an examination of the Bill of Complaint now on file in this Court.

That deponent is informed and believes that on February 2, 1911, an action was commenced in the Supreme Court, New York County, by Conrad Morris

Affidavit and Notice of Motion for Stay

Braker against the New York Finance Company, Frank L. Rabe and Austin B. Fletcher as testamentary trustee, for the said Conrad Morris Braker under the last will and testament of Conrad Braker, Jr. That the Austin B. Fletcher mentioned as defendant in that action in the State Court is the same Austin B. Fletcher mentioned as defendant in this action. That it appears by the complaint in said action, a copy of which deponent asks leave to present upon the argument of this motion, that the plaintiff in said action Conrad Morris Braker, is seeking to affect the delivery, surrender and cancellation of certain assignments of interest in the estate of his father Conrad Braker, Jr., deceased, made to the defendants in that action, Frank L. Rabe and New York Finance Company, as security for a loan of \$2500.00 made to said Braker June 13, 1901, upon the ground that said loan has been paid, and upon the further ground that said loan was usurious, and that the said assignments made as security for said loan are void.

That deponent is informed and believes that on the 23rd day of February, 1911, the defendant New York Finance Company appeared in said action and served an answer by its attorney Asa L. Carter, whom, deponent is informed and believes, is associated with the attorney for the complainant herein, Frederic W. Frost, Esq. That deponent begs leave to present to the Court a copy of said answer upon the argument of this motion; that it appears by an examination of said answer that the defendant New York Finance Company claims that the transfer of the interest of said Braker in his father's estate by said assignment alleged by him to be void for usury was an absolute

Affidavit and Notice of Motion for Stay

sale, and said defendant New York Finance Company claims that it became entitled to receive, and should have received on the 21st day of July, 1910, and is still entitled to receive from the defendant Austin B. Fletcher as trustee as aforesaid the sum of ten thousand dollars, and asks judgment that the said Austin B. Fletcher as testamentary trustee pay to said defendant New York Finance Company the said sum of \$10,000.00 now held by him as trustee.

That the defendant in this action had no knowledge that the complainants claimed any rights in the interest of Conrad Morris Braker in the estate of his father Conrad Braker, Jr., by assignment or otherwise until the commencement of this action. That it appears, however, by an examination of the Bill of Complaint herein (Paragraph 16th, and Exhibits F and G) that on December 19, 1906, the New York Finance Company made and delivered to the complainants herein a note for \$10,000.00 and an assignment as security for the payment thereof to the complainants herein of the interest of said Conrad Morris Braker under the will of his father Conrad Braker, Jr., which he had theretofore assumed to assign to the said New York Finance Company. That it appears that this assignment from the New York Finance Company to the complainants herein (Exhibit G, Bill of Complaint) was made after July 21, 1905, when, as alleged in the complaint in the State action Conrad Morris Braker claims to have paid in full the loan made to him by the New York Finance Company.

That deponent is informed and believes that on April 29, 1911, a letter of which the following is a copy was sent to one of the complainants in this action by Safford A. Crummey, attorney for the plaintiff Conrad Morris Braker in the action in the State Court.

Affidavit and Notice of Motion for Stay

April 29, 1911.

Mr. John A. S. Brown,
Franklin Building,
Philadelphia, Pa.

Dear Sir:

I am informed that you and Frank E. Schermerhorn as trustees, loaned \$10,000 to the New York Finance Company in December, 1906, and received as collateral security therefor a note payable July 21, 1910, and an assignment from the New York Finance Company of certain legacies due Conrad Morris Braker under the will of his father Conrad Braker, Jr.

I represent Mr. Braker who has commenced an action in the Supreme Court of this State to have the assignments made by him to Frank L. Rabe which were assigned by Rabe to the New York Finance Company, of the aforesaid legacies declared null and void.

I did not learn until recently that the New York Finance Company had made an assignment to you and Frank E. Schermerhorn as trustees, and I write to ascertain whether you claim any present interest under said assignment or whether the loan has been paid.

I will appreciate a prompt answer from you.

Very truly yours,

(sgd) Safford A. Crummev.

That it appears in the Bill of Complaint herein that the complainants are residents of the State of Pennsylvania, and that after the date of said letter, namely, April 29, 1911, to wit, on May 6, 1911 (see Ex. H, Bill of Complaint) the complainants herein made an assignment to Charles Z. Wolff, and that on the said 6th day of May, 1911, the said Charles Z. Wolff (see Ex. I, Bill of Complaint) made an assignment

Affidavit and Notice of Motion for Stay

to the complainants herein of the said interest of Conrad Morris Braker in the will of his father Conrad Braker, Jr., alleged to have been assigned by the New York Finance Company to the complainants on December 19, 1906.

That it appears from the foregoing that the complainants have had notice of the pendency of the action in the State Court since April 29, 1911, and have elected not to come into the action in the State Court but have brought this action in the Circuit Court of the United States, in both of which actions Austin B. Fletcher as trustee under the will of Conrad Braker, Jr., is a defendant.

That it would be unjust for the said defendant to be compelled to defend both actions where his duty is simply that of a trustee holding the money subject to the determination of the Court as to the proper person entitled to the money; that all of the rights of the claimants to the money can be determined in the action in the State Court and that the rights of all the parties can be determined if the complainants in this action make application to become parties to the action in the State Court.

Deponent asks that the pending action in the Circuit Court of the United States be stayed, and that an order of the Circuit Court of the United States issue staying the complainants in this action and all proceedings in this Court pending the trial and determination of the action in the State Court, in which Conrad Morris Braker is plaintiff and the New York Finance Company and others above referred to are parties defendant, and that the defendant have until the rule day next after the stay is vacated to plead, answer or demur, and for such other relief as may seem just and equitable to the Court.

Affidavit and Notice of Motion for Stay

That no previous application has been made for the relief herein applied for.

Sworn to before me this	}	(Sgd.) WM. P. S. MELVIN.
6th day of November,		
1911.		

EVA COHEN,
(Seal) *Notary Public* 50,
New York County.

(Indorsed: "Circuit Court of the United States, Southern District of New York. John A. S. Brown and Frank E. Schermerhorn, as Trustee, etc. vs. Austin B. Fletcher, as Testamentary Trustee, etc. Affidavit and Notice of Motion. U. S. Circuit Court, Southern District N. Y. Filed Nov. 10, 1911. John A. Shields, Clerk. William P. S. Melvin, Solicitor for the defendant, Office & Post Office address, 165 Broadway, Borough of Manhattan, New York City. Copy received November 1911, Fredric W. Frost, Atty. for Plaintiffs.")

Affidavit in Reply to Motion for Stay

AFFIDAVIT IN REPLY TO MOTION FOR STAY.

CIRCUIT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schmerhorn, as Trustee for Clara
Schmerhorn, under the Last Will
and Testament of Thomas Cunning-
ham, deceased, and a citizen of the
State of Pennsylvania,*

versus

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker
under the Last Will and Testament
of Conrad Braker, Jr., deceased, and
a citizen of the State of New York.*

STATE OF PENNSYLVANIA, } ss.:
CITY AND COUNTY OF PHILADELPHIA, }

FRANK E. SCHERMERHORN, being duly sworn according to law, deposes and says; that he, acting as Trustee for Clara Schmerhorn under the last Will and Testament of Thomas Cunningham, deceased, is one of the plaintiffs in the above entitled action. That on information deponent believes it to be true that an action has been begun by one Conrad Morris Braker against Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker under the last Will and Tes-

Affidavit in Reply to Motion for Stay

tament of Conrad Braker, Jr., deceased, the defendant in the above entitled action, in the Supreme Court for New York County, but that neither deponent, nor his co-complainant, John A. S. Brown, are, or have been made parties defendant to the said action in the Supreme Court. The deponent is not aware whether it be true, as alleged in the affidavit of William P. S. Melvin, verified November 6th, 1911, that the first knowledge acquired by the defendant, Austin B. Fletcher, Trustee as aforesaid, of the assignment made to complainants of the interest of Conrad Morris Braker, more particularly described in the Bill of Complaint herein was on or about April 29th, 1911, but deponent avers that the said assignment was duly recorded in accordance with the laws of the State of New York in the Office of the Surrogate of the County of New York, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 204, on December 21st, 1906. Deponent further says that it is true that complainants have elected not to come into the action in the State Court to which they are not made parties, but have relied, and do rely upon their rights as citizens of the State of Pennsylvania, to have their rights against a citizen of the State of New York adjudicated in the Federal Courts, in accordance with the Constitution of the United States and the laws of Congress passed in pursuance thereof. Deponent further avers that he is advised by counsel that the action begun in the Supreme Court of the State of New York aforesaid is an action seeking to set aside a deed of assignment under which complainants claim title, that complainants are further advised that said action cannot be maintained without complainants, who are vested with the title, being made parties therein, and

Affidavit in Reply to Motion for Stay

that if so made parties, complainants would have a right to remove the cause to this Court.

Sworn to and sub- scribed before me, this 9th day of November, A. D. 1911.	}	Signed FRANK E. SCHERMERHORN.
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(Signed)

GEORGE KOPPENHOFER, JR.,

(Seal)

Notary Public.

My Commission Expires, March 10, 1913.

(Indorsed: "Circuit Court of the United States, Southern District of New York. Eq. 7-231, John A. S. Brown and Frank E. Schermerhorn as Trustee, etc. vs. Austin B. Fletcher, as Testamentary Trustee, etc. Affidavit in Reply to Motion to Stay. U. S. Circuit Court, Southern District N. Y. Filed Nov. 10, 1911. John A. Shields, Clerk. Fredric W. Frost, Solicitor for the Complainants, Office and Post Office Address, 60 Wall Street, Borough of Manhattan, New York City.")

Order Denying Stay

ORDER DENYING STAY.

At a term of the Circuit Court of the United States held in and for the Southern District of New York, at the Court House thereof in the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 19 day of December, 1911.

Present

HON. WALTER C. NOYES,
Circuit Judge.

John A. S. Brown, a citizen of the State of Pennsylvania, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, and a citizen of the State of Pennsylvania,

versus

Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York.

A motion having been made at a term of this Court held in and for the Southern District of New York at the United States Post Office Building in the Borough of Manhattan and City of New York on the 10th day of November, 1911, for an order staying the complainants in this action and all the proceedings in this Court in this action pending the trial and determination of an action in the Supreme Court, State of New York, County of New York, in which Conrad Morris Braker is plaintiff and New York Finance Com-

Order Denying Stay

pany, Frank L. Rabe and Austin B. Fletcher as testamentary trustee for the said Conrad Morris Braker under the last will and testament of Conrad Braker, Jr., are defendants, and extending the time of the defendant to plead, answer or demur herein until the rule day next after the stay applied for is vacated, and granting such other relief as might seem just and equitable to the Court, and upon reading and filing the Notice of Motion dated November 6, 1911, and the affidavit of William P. S. Melvin, solicitor for the defendant, verified November 6, 1911, in favor of the motion, and the affidavit of Frank E. Schermerhorn, verified November 9, 1911, in opposition to the motion, and after hearing the argument of the solicitor for the defendant on behalf of said motion, and Chas. H. Burr of Counsel for the complainants in opposition thereto,

Now, on motion of Fredric W. Frost, solicitor for the complainants, it is hereby

ORDERED, that the motion be denied without costs without prejudice to the right of the defendant herein to make other and further applications for the relief asked for upon this motion.

WALTER C. NOYES,
U. S. Circuit Judge.

(Indorsed: "Circuit Court of the United States, Southern District of New York. Eq. 7-231, John A. S. Brown and Frank E. Schermerhorn, as Trustee, etc. vs. Austin B. Fletcher, as Testamentary Trustee, etc. Order Denying Motion. F. W. Frost, Atty. for Complt. I consent to the entry of the within order. Fredric W. Frost, Solicitor for Complainants. Wm. P. S. Melvin, Solicitor for Deft. Dec. 14, 1911. U. S. Circuit Court, Southern District N. Y. Filed Dec. 19, 1911. John A. Shields, Clerk.")

Demurrer

DEMURRER.

CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTH-
ERN DISTRICT OF NEW YORK.

*John A. S. Brown and Frank E.
Schmerhorn as Trustee for
Clara Schmerhorn, Under
the Last Will and Testament of
Thomas Cunningham, De-
ceased,*

Complainants,

against

*Austin B. Fletcher, as Testament-
ary Trustee of Conrad Morris
Braker Under the Last Will
and Testament of Conrad
Braker, Jr., Deceased,*

Defendant.

The demurrer of the above named defendant to
the bill of complaint of the above named complainants.

This defendant doth demur to the said bill and for
causes of demurrer sheweth

I. That it appeareth by the complainants' own
showing by the said bill that they are not entitled to
the relief prayed by the said bill against this defend-
ant.

II. That it appeareth by the bill that the com-
plainants have an adequate remedy at law.

III. That it appears by the said bill that there are
divers other persons who are necessary parties to the
said bill, but who are not made parties thereto. In

Demurrer

particular, it so appears that the said Conrad Morris Braker, referred to in the said bill, of the city of New York, the *cestui que trust* of the said defendant, Austin B. Fletcher, as testamentary trustee under the will of Conrad Braker, Jr., is a necessary party defendant to said bill.

IV. Moreover, it appears by the said bill that the New York Finance Company, a corporation therein described as duly organized and existing under the laws of the State of New York is a necessary party defendant thereto.

V. It likewise appears that Charles Z. Wolff named in said bill is a necessary party plaintiff thereto.

VI. That another court of equity has jurisdiction herein in this—that there is pending in the Supreme Court of the State of New York an action in equity instituted prior to the filing of the bill in this suit, in which said Conrad Morris Braker is plaintiff and said Frank L. Rabe (named in said bill) and said New York Finance Company and said Austin B. Fletcher, as trustee, are defendants, in which action the said plaintiff prays judgment that the assignment of an interest in a certain legacy (being the same legacy mentioned in the sixth paragraph of said bill) from said plaintiff, Conrad M. Braker, to said Frank L. Rabe, and from said Frank L. Rabe to the defendant New York Finance Company, be declared void and of no effect on account of usury on the part of said Rabe in obtaining said assignment to him. That in said action the New York Finance Company has joined issue with plaintiff, Conrad M. Braker, as to all the allegations of the complaint therein concerning the usury, and has set up affirmatively the execution of the said assignment to said Rabe of the interest in the said legacy

Demurrer

under the last will and testament of Conrad Braker, Jr., and of its subsequent assignment by said Rabe to the New York Finance Company, and the lapse of time which postponed the payment of the said legacy under said will, and it prays the decree of the Court that said Austin B. Fletcher, as trustee, shall pay over unto it, said Finance Company, the balance payable of said legacy, to wit, the sum of ten thousand dollars; and this defendant, Austin B. Fletcher, as trustee, insists that the complainants in the bill of complaint herein should become parties defendant in said action in the state court to the end that the decree therein may be determinative of the rights of all parties regarding said legacy referred to in said sixth paragraph of said bill wherein the said \$10,000 is alleged to be payable.

Wherefore this defendant prays the judgment of this Honorable Court whether he shall be compelled to make any answer to the said bill, and he prays to be hence dismissed with his reasonable costs in this behalf sustained.

WILLIAM P. S. MELVIN,
Solicitor and of Counsel for Defendant,
Austin B. Fletcher, as Testamentary
Trustee, etc.
165 Broadway, New York City, N. Y.

I hereby certify that the foregoing demurrer is in my opinion well-founded in point of law.

WILLIAM P. S. MELVIN,
Of Counsel for Defendant, Austin B.
Fletcher, as Testamentary Trustee,
etc.

New York, December 4, 1911.

Demurrer

STATE OF NEW YORK,
 CITY AND COUNTY OF NEW YORK, } ss.:
 SOUTHERN DISTRICT OF NEW YORK, }

Austin B. Fletcher, being duly sworn, deposes and says: I am the above named defendant. The foregoing demurrer is not interposed for delay.

Sworn to before me }
 this 4th day of } (Sgd.) AUSTIN B. FLETCHER,
 December, 1911. }

HENRY SILLCOCKS,
 (Seal) *Notary Public,*
 County of New York.

(Endorsed: "Circuit Court of the United States, Southern District of New York. John A. S. Brown and Frank E. Schermerhorn, as Trustee, etc. Complainants, against Austin B. Fletcher, as Testamentary Trustee, etc., defendant. Demurrer to Bill of Complaint. William P. S. Melvin, of Counsel for Defendant, Austin B. Fletcher, office & post-office address, 165 Broadway, Borough of Manhattan, New York City. U. S. Circuit Court, Southern District N. Y. Filed Dec. 4, 1911. John A. Shields, Clerk.")

Opinion on Demurrer

OPINION ON DEMURRER.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK.

<i>John A. S. Brown and Frank E. Schmerhorn, as Trustees, etc.,</i>	}
against	
<i>Austin B. Fletcher, as Testa mentary Trustee, etc.</i>	

HAND, District Judge:

On the argument I said that there were only two points that seemed doubtful, first, the absence of any allegation as to the residence of the intermediate assignors, second, the allegation of title in the complainants.

On reading the bill I find that the New York Finance Company, the intermediate assignor was a New York corporation and the question therefore arises whether the claim is a "Chose in action" under Section 24 (1) of the Judiciary Code. The original assignor was Braker, who assigned to Rabe, who assigned to the New York Finance Company, who assigned to complainant. At the time of his assignment Braker was cestui que trust of a fund, or rather part of a fund of fifty thousand dollars which had been paid to a trustee for his benefit under the terms of his father's will. I think it especially of importance to remember that the trustee no longer remained a legatee of the estate, he had paid the whole legacy bequeathed to him by the will, and he held it in trust for Braker, though the terms of the trust were to be

Opinion on Demurrer

found in the will. The question is whether the interest of a cestui que trust on a sum of money held for him by a trustee is a chose in action within the section named. In strict legal theory that is no doubt the case, the trustee has the entire title and the cestui que trust only the right to call him to account; he has no right to the *res* whatever, his sole right is *in personam* against the trustee. Such certainly is the better and in my judgment the only theory, but it is by no means consistently grasped or understood in the decisions, nor is it necessary to base a decision upon it. Whatever be in theory the relation of the cestui que trust to the property, I do not think that his interest is what the statute meant by a chose in action. There appears to be no authority upon the subject, though Mr. Justice McKenna—in *Ingersoll* against *Coram*, 211 U. S., 336, doubted whether even the distributive share of a legatee was a chose in action. That case turned in respect of jurisdiction upon another point but the doubt is significant since the distributive share is certainly much more ambulatory, less *in rem* so to speak than the right of a cestui que trust in a separate fund. In respect of real estate we are all familiar with "Equitable estates" and the Supreme Court has even said that a court of equity looked upon a cestui que trust as seized of the estate *deu ex dem*. *Croxall* vs. *Sherard*, 5 Wall. 268. In respect of personal property also the cestui que trust is entitled to possession of the *res* unless its nature precludes; in short he is entitled at least on a case like this to all absolute interest save the legal title and actual possession. It would be a piece of doubtful pedantry I think in view of the usual meaning of the word "chose in action" to apply it to a relation like that created by the fourteenth paragraph of the will.

Opinion on Demurrer

There is no multifariousness, the bill is unusually direct and simple.

The allegation in the eighteenth article of the bill is sufficient of a devolution of title from New York Finance Company to Wolff, and in the nineteenth article from Wolff to the complainants. The objection is invalid even under New York law that no notice is alleged to have been given by the holders of the note to the New York Finance Company. *Williams vs. U. S. Trust Co.*, 133 N. Y. 660.

An allegation of "refusal" and "request" will avail as a "demand" if one be necessary nor is the extent of relief open on demurrer.

The parties omitted are proper but not necessary parties.

The complainants may take a decree *respondeat ouster* with costs.

L. H.,
D. J.

(Indorsed: "U. S. District Court, Southern District of New York. John A. S. Brown and Frank E. Schermerhorn, as Trustees, vs. Austin B. Fletcher, as Testamentary Trustee. Hand, District Judge. 1912. No. 16. February 13, 1912. U. S. District Court. Filed Feb. 13, 1912. M., S. D. of N. Y. Eq. 7-231.")

Decree Overruling Demurrer

DECREE OVERRULING DEMURRER.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK.

*John A. S. Brown, and Frank E.
Schmerhorn as Trustee for
Clara Schmerhorn Under the
Last Will and Testament of
Thomas Cunningham, Deceased,*
Complainants,

against

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Bra-
ker, Under the Last Will and
Testament of Conrad Braker,
Jr., Deceased,*

Defendant.

The complainants having filed their bill against the above-named defendants and the defendant having demurred to said bill of complaint and the complainant having noticed said demurrer for argument and the same having come on to be heard and the court having heard William P. S. Melvin, Esq., of counsel for the said defendant, in support of said demurrer, and Charles H. Burr, Esq., of counsel for the complainants in opposition thereto, and due deliberation having been had thereon,

It is hereby ordered, adjudged and decreed that the said demurrer be and the same hereby is in all respects overruled with costs.

It is further ordered, adjudged and decreed that

Decree Dismissing Demurrer

said defendant will have 20 days in which to file and serve an answer to said bill of complaint.

Ordered this 6th day of March, 1912.

LEARNED HAND,
D. J.

Sir: Please take notice that a decree of which the within is a copy, was this day duly entered and filed in the office of the clerk of the United States District Court for the Southern District of New York.

Dated, New York, March 6, 1912.

FREDRIC W. FROST,
Attorney for Complainants,
60 Wall St., New York City.

To Wm. P. S. Melvin, Esq.,
Solicitor for Defendant,
165 Broadway,
New York City.

(Endorsed: "U. S. District Court, Southern District of N. Y. Eq. 7-231. John A. S. Brown and Frank E. Schermerhorn, etc., plaintiff, against Austin B. Fletcher, etc., defendant. Decree overruling Demurrer with notice of settlement. Fredric Worthen Frost, Solicitor for complainant, No. 60 Wall Street, New York, N. Y. Due service of a copy of the within is hereby admitted, Wm. P. S. Melvin, Atty. for deft. this 5th day of March, 1912. U. S. District Court, filed Mar. 6th, 1912. M. S. D. of N. Y.")

Affidavit for Stay, and Order
COMPLAINANTS' TESTIMONY.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN
 DISTRICT OF NEW YORK.

*John A. S. Brown, a citizen of the State
 of Pennsylvania, and Frank E.
 Schermerhorn as Trustee for Clara
 Schermerhorn, under the last will
 and testament of Thomas Cunning-
 ham, deceased, and a citizen of the
 State of Pennsylvania,*
 Complainants,

versus

*Austin B. Fletcher, as Testamentary
 Trustee of Conrad Morris Braker,
 under the Last Will and Testament
 of Conrad Braker, Jr., deceased,
 and a citizen of the State of New
 York,*
 Defendant.

Upon the annexed affidavit of William P. S. Melvin, solicitor for the defendant in this action, verified March 23, 1912, let the complainants herein show cause at a term of the District Court of the United States to be held in and for the Southern District of New York at the United States Post Office Building in the Borough of Manhattan and City of New York on the 29th day of March, 1912, at 10.30 o'clock A. M. or as soon thereafter as counsel can be heard, why an order of this Court should not be granted staying the complainants in this action and all the proceedings in this Court pending the hearing and final determination of the proceedings in the Surrogates' Court of New York

Affidavit for Stay, and Order

County instituted on March 16, 1912, by Austin B. Fletcher as testamentary trustee for Conrad Morris Braker under clause 14 of the last will and testament of Conrad Braker, Jr., deceased, and why such other relief should not be granted as may seem just and equitable to the court; and good cause appearing therefor, let all proceedings in this action until the hearing and final determination of the motion to be made upon the return of this order be stayed and let the defendant herein have until ten days after the hearing and final determination of said motion, if adverse to him to answer the Bill of Complaint herein.

GEORGE C. HOLT,
United States District Judge.

Dated New York, March 25, 1912.

Affidavit for Stay, and Order

DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schmerhorn as Trustee for Clara
Schmerhorn, under the last will
and testament of Thomas Cunning-
ham, deceased, and a citizen of the
State of Pennsylvania,*

Complainants,

versus

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker
under the Last Will and Testament
of Conrad Braker, Jr., deceased,
and a citizen of the State of New
York,*

Defendant.

CITY, COUNTY AND }
STATE OF NEW YORK, } ss.:

WILLIAM P. S. MELVIN, being duly sworn, says that he is an attorney having an office at 165 Broadway, Borough of Manhattan, New York City; that this action was commenced by the service of a subpoena on the defendant on October 4, 1911, that it appears by an examination of the Bill of Complaint herein that this is an action brought by the complainants to recover of the defendant the sum of \$10,000.00 upon a cause of action which will more fully appear by an examination of the Bill of Complaint now on file in this Court.

That on November 6, 1911, deponent filed a Notice

Affidavit for Stay, and Order

of Appearance as solicitor for the defendant, and on December 4, 1911, filed a demurrer.

That deponent is informed and believes that on February 2, 1911, an action was commenced in the Supreme Court, New York County, by Conrad Morris Braker against the New York Finance Company, Frank L. Rabe and Austin B. Fletcher as testamentary trustee, for the said Conrad Morris Braker under the last will and testament of Conrad Braker, Jr. That the Austin B. Fletcher mentioned as defendant in that action in the State Court is the same Austin B. Fletcher mentioned as defendant in this action. That it appears by the complaint in said action, a copy of which deponent asks leave to present upon the argument of this motion, that the plaintiff in said action, Conrad Morris Braker, is seeking to effect the delivery, surrender and cancellation of certain assignments of interest in the estate of his father Conrad Braker, Jr., deceased, made to the defendants in that action, Frank L. Rabe and New York Finance Company, as security for a loan of \$2,500.00 made to said Braker June 13, 1901, upon the ground that said loan has been paid, and upon the further ground that said loan was usurious, and that the said assignments made as security for said loan are void because of usury.

That deponent is informed and believes that on the 23rd day of February, 1911, the defendant New York Finance Company appeared in said action and served an answer by its attorney Asa L. Carter, whom, deponent is informed and believes, is associated with the attorney for the complainant herein, Fredric W. Frost, Esq. That deponent begs leave to present to the Court a copy of said answer upon the argument of this motion; that it appears by an examination of said answer that the defendant New York Finance Com-

Affidavit for Stay, and Order

pany claims that the transfer of the interest of said Braker in his father's estate by said assignment alleged by him to be void for usury was an absolute sale, and said defendant New York Finance Company claims that it became entitled to receive, and should have received on the 21st day of July, 1910, and is still entitled to receive from the defendant Austin B. Fletcher as trustee as aforesaid the sum of ten thousand dollars, and asks judgment that the said Austin B. Fletcher as testamentary trustee pay to said defendant New York Finance Company the said sum of \$10,000.00 now held by him as trustee.

That in said action in the Supreme Court the defendant Austin B. Fletcher, as testamentary trustee for Conrad Morris Braker under the last will and testament of Conrad Braker, Jr., deceased, appeared by deponent, and an answer was served March 16, 1911, a copy of which deponent asks leave to present upon the argument of this motion, in and by which said defendant submitted the question of his rights and duties as between the plaintiff and the defendant New York Finance Company in said action to the determination of that Court.

That the issues between the parties in said action in the Supreme Court were tried on January 24 and 25, 1912, before Mr. Justice Greenbaum at Special Term, Part IV, of the Supreme Court, New York County, and on February 5, 1912, a judgment was rendered and entered in favor of the plaintiff Conrad Morris Braker and against the defendant New York Finance Company and said Austin B. Fletcher as trustee, etc., a copy of which judgment deponent asks leave to present upon the argument of this motion, in and by which it was adjudged, among other things that the said assignments of interest in the estate of his father Conrad

Affidavit for Stay, and Order

Braker, Jr., deceased, made by Conrad Morris Braker to Frank L. Rabe on June 13, 1901, and by said Frank L. Rabe to New York Finance Company on October 1, 1901 (under which the complainants in this action claim by mesne assignments), were and are mere covers for an usurious transaction, and were and are usurious and void; that the said defendants Frank L. Rabe and New York Finance Company acquired no interest under said assignments in said legacy of \$10,000 payable to Conrad Morris Braker on July 21, 1910, by and under the will of his father now held in trust for him by the defendant Austin B. Fletcher as trustee, etc., or any part thereof; that the defendants Frank L. Rabe and New York Finance Company should deliver up and surrender said assignments (under which the complainants in this action claim) to be cancelled; that the Register and the Surrogate of the County should cancel the record of said assignments, and that the defendant Austin B. Fletcher, as testamentary trustee, etc., should pay over to Conrad Morris Braker the said fund of \$10,000 held in trust for him with the interest accumulated thereon from July 21, 1910.

That on February 15, 1912, a notice of an appeal from said judgment on the part of the defendant New York Finance Company was served upon deponent, and said appeal is now pending undetermined. That it is alleged in the Bill of Complaint herein (Paragraph 16th, and Exhibits F and G) that on December 19, 1906, the New York Finance Company made and delivered to the complainants herein a note for \$10,000 and an assignment as security for the payment thereof to the complainants herein of the interest of said Conrad Morris Braker under the will of his father Conrad Braker, Jr., which he had theretofore assumed to assign to the said New York Finance Company. That it

Affidavit for Stay, and Order

appears that this assignment from the New York Finance Company to the complainants herein (Exhibit G, Bill of Complaint) was made after July 21, 1905, when as alleged in the complaint in the State action Conrad Morris Braker claims to have paid in full the loan made to him by the New York Finance Company.

That deponent is informed and believes that on April 29, 1911, a letter of which the following is a copy was sent to one of the complainants in this action by Safford A. Crummey, attorney for the plaintiff Conrad Morris Braker in the action in the State Court:

April 29, 1911.

Mr. John A. S. Brown,
Franklin Building,
Philadelphia, Pa.

Dear Sir:

I am informed that you and Frank E. Schermerhorn as trustees, loaned \$10,000 to the New York Finance Company in December, 1906, and received as collateral security therefor a note payable July 21, 1910, and an assignment from the New York Finance Company of certain legacies due Conrad Morris Braker under the will of his father Conrad Braker, Jr.

I represent Mr. Braker who has commenced an action in the Supreme Court of this State to have the assignment made by him to Frank L. Rabe which was assigned by Rabe to the New York Finance Company, of the aforesaid legacies declared null and void.

I did not learn until recently that the New York Finance Company had made an assignment to you and Frank E. Schermerhorn as trustees, and I write to ascertain whether you claim any present interest under said assignment or whether the loan has been paid.

I will appreciate a prompt answer from you.

Very truly yours,

(sgd) Safford A. Crummey.

Affidavit for Stay, and Order

That it is alleged in the Bill of Complaint herein that the complainants are residents of the State of Pennsylvania, and that after the date of said letter, namely, April 29, 1911, to wit, on May 6, 1911 (see Ex. H, Bill of Complaint), the complainants herein made an assignment to Charles Z. Wolff, and that on the said 6th day of May, 1911, the said Charles Z. Wolff (see Ex. I, Bill of Complaint) made an assignment to the complainants herein of the said interest of Conrad Morris Braker in the will of his father Conrad Braker, Jr., alleged to have been assigned by the New York Finance Company to the complainants on December 19, 1906.

That it appears from the foregoing that the complainants have had notice of the pendency of the action in the State Court since April 29, 1911, and have elected not to come into the action in the State Court but have brought this action in the Circuit Court of the United States, in both of which action Austin B. Fletcher as trustee under the will of Conrad Braker, Jr., is a defendant.

That a motion was made on November 10, 1911, for an order staying all proceedings in this action; that said motion was made before the defendant had served any pleading to the Bill of Complaint; that said motion was denied as premature without prejudice to defendant's right to renew the same later on in this action.

That on December 4, 1911, the defendant herein filed a demurrer to the Bill of Complaint, and on February 13, 1912, the said demurrer upon argument was overruled with costs with leave to defendant to answer. That defendant's time to answer will expire on March 26th next.

That it appears by the opinion of Judge Hand, who wrote the opinion overruling the demurrer, a copy

Affidavit for Stay, and Order

of which deponent asks leave to present upon the argument of this motion, that the complainants herein, if successful, cannot hope to secure a judgment directing the trustee to pay to them the said fund of \$10,000, and such judgment would only be *in personam* against the defendant.

That from the foregoing it appears that Conrad Morris Braker has obtained a judgment in the Supreme Court of the State of New York directing this defendant to pay over to him the fund of \$10,000 now in this defendant's possession, and that in this action the complainants are seeking to obtain a judgment requiring this defendant to pay over to them this trust fund of \$10,000; that it would be manifestly unjust and inequitable for the said defendant to be compelled to pay the said \$10,000 to Conrad Morris Braker and also, in the case of the success of the complainants, to pay to them a like sum, and this defendant should not be compelled to defend in this action was well as in the action in the Supreme Court of the State of New York where his duty is simply that of a trustee holding a fund as a stakeholder subject to the determination of the proper court as to the proper person or persons entitled to the money.

That in view of these considerations this defendant, on March 16, 1912, filed his account as trustee of the fund mentioned and described in Clause 14 of the last will and testament of Conrad Braker, Jr., deceased, in the office of the Surrogate of New York County by whom this defendant was appointed trustee, and on the same day this defendant filed his petition for a final judicial settlement of his account as such trustee, and a citation was thereupon issued on March 16, 1912, directed to Conrad Morris Braker, Frank L. Rabe, New York Finance Company, John A. S. Brown, Frank E. Schermerhorn as trustee for Clara Scher-

Affidavit for Stay, and Order

merhorn under the last will and testament of Thomas Cunningham, deceased (the two foregoing being the complainants in this action), and Charles Z. Wolff, citing them to appear at a Surrogates' Court to be held on May 14, 1912, to attend the final judicial settlement of the accounts of this defendant; that said citation was served on Conrad Morris Braker on the 22nd day of March, 1912; that on the 22nd day of March, 1912, an order for the service of said citation by publication upon Frank L. Rabe, John A. S. Brown, Frank E. Schermerhorn as trustee, etc., and Charles Z. Wolff was granted by the Surrogate of New York County, and the service of said citation by publication upon the said non-residents is proceeding; that all matters in issue between the various claimants to this fund can be tried and determined in this proceeding in the Surrogates' Court of New York County, and pending the trial and determination of these issues all proceedings in this action should be stayed.

Deponent therefore asks that all proceedings in the pending action in this court be stayed and that an order of this court may issue staying the complainants in this action and all proceedings in this court pending the hearing and determination of said proceedings in the Surrogates' Court of New York County and granting such other relief as may seem just and equitable to the Court; and deponent further asks that an order be granted by this Court forthwith requiring the complainants herein to show cause on the first motion day why an order should not be granted staying the complainants in this action and all proceedings in this action pending the hearing and determination of the said proceedings now pending in the Surrogates' Court of New York County; and it appearing that the time within which the defendant must answer the bill of

Affidavit for Stay, and Order

complaint herein will expire on March 26, 1912, deponent asks that said order to show cause contain a provision staying all proceedings in this action pending the hearing and final determination of the motion to be made upon the return of said order to show cause, and extending the time of this defendant to answer the bill of complaint until ten days after the hearing and final determination of said motion if the same is adverse to this defendant.

That no previous application has been made for the order herein asked for.

Sworn to before me this }
 23rd day of March, 1912. } WM. P. S. MELVIN.

JOHN G. DANIEL,
 (Seal) *Notary Public,*
 Kings County, No. 155.

Certificate filed in New York County, No. 76.

Kings County Register's No. 4783.

New York County Register's No. 3185.

Commission expires March 30, 1913.

(Indorsed: "District Court of the United States, Southern District of New York. Eq. 7-231. John A. S. Brown and another, Complainants, against Austin B. Fletcher, as Testamentary Trustee, etc., Defendants. Affidavit & Order to Show Cause. Endorsed, Noyes, J. Motion denied, Noyes, C. J., Apl. 13, 1912, U. S. District Court. Filed Apr. 15, 1912, S. D. of N. Y. William P. S. Melvin, Attorney for Defendant. Office & P. O. Address, 165 Broadway, Borough of Manhattan, New York City. Copy received this 25th day of Mar., 1912. Fredric W. Frost, Solicitor for Complts.")

Answer to Motion for Stay

ANSWER TO MOTION FOR STAY.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schermerhorn as Trustee for Clara
Schermerhorn, under the last will
and testament of Thomas Cunning-
ham, deceased, and a citizen of the
State of Pennsylvania,*

Complainants,

versus

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
under the Last Will and Testament
of Conrad Braker, Jr., deceased,
and a citizen of the State of New
York,*

Defendant.

AND now, this 3rd day of April, 1912, come into Court John A. S. Brown, and Frank E. Schermerhorn as Trustee for Clara Schermerhorn, Complainants in the above entitled action, and in response to the Rule to show cause heretofore granted why an order of this Court should not be granted staying Complainants in this action, say:

FIRST: Complainants admit that a certain action was begun in the Supreme Court of New York County by Conrad Morris Braker against the New York Finance Company, Frank L. Rabe, and Austin B. Fletcher, as Testamentary Trustee of the said Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased. The Complainants further say that Complainants have not been made parties to the said action, but that Complainants are

Answer to Motion for Stay

the absolute and record holders under the recording acts of the complete and full right, title and interest in and to the said legacy of \$10,000. Complainants further say that the New York Finance Company has never claimed the right to receive the said \$10,000 against Complainants, but on the contrary has only claimed the same for the purpose of paying Complainants. Complainants further say that on the trial of the said Supreme Court action, counsel for the said New York Finance Company moved to amend the answer as follows:

"I further desire to allege in the amended answer that on the 19th day of December, 1906, said New York Finance Company did make and deliver to John A. S. Brown, and unto Frank E. Schermerhorn as Trustee of Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, a certain promissory Note bearing date also that date, provided for the payment of a certain sum of \$10,000 on the 21st day of July, 1910, together with interest thereon at the rate of six per cent. per annum, and as security of the payment of said Note did also make, execute and deliver unto John A. S. Brown, and unto the said Frank E. Schermerhorn as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, an assignment of a certain part of all right, title and interest in said New York Finance Company, in and to the estate of Conrad Braker, Jr., deceased, to-wit, a half part of a certain estate, right, title and interest to any and all moneys coming to the said New York Finance Company therefrom, which had been theretofore sold and assigned by the said Frank L. Rabe to the said New York Finance Company, by the aforementioned instrument, dated October 1st, 1909, as by the said assignment bearing date the said 19th day of December, 1906, will more fully and at large appear. Which assignment was duly recorded in the office

Answer to Motion for Stay

of the Surrogate of the County of New York, in Liber 3 of Conveyances and Mortgages by intestate in the decedent's estate, page 204, on the 21st day of December, 1906. And that the defendant, the New York Finance Company makes no claim whatever because of the assignment to the said Brown and Schermerhorn, trustees, but that the claim made in the answer was made only with the view of collection and accounting to said Brown and Schermerhorn."

Complainants attach hereto a copy of an absolute and complete release which the said New York Finance Company has served upon Austin B. Fletcher, as Testamentary Trustee, defendant herein. Complainants further say that one A. L. Carter, counsel for the New York Finance Company in the said suit in the Supreme Court of New York County is not in any way counsel for complainants, or associated with counsel for Complainants—Fredric W. Frost.

Complainants further say that Austin B. Fletcher, Esq., the defendant herein, Safford A. Crummey, Esq., the counsel for Conrad Morris Braker, and William P. S. Melvin, Esq., the counsel for the defendant herein, are all members of this bar, having offices together at 165 Broadway, in the City of New York; and that Safford A. Crummey, Esq., argued on behalf of defendant the first rule to stay in this action.

Complainants further say that in the said action in the Supreme Court of the County of New York the defendant herein has not answered at any time showing that the record title was in Complainants, nor has he sought to make Complainants parties to said action, but has on all occasions attempted to procure a decree in favor of the said Conrad Morris Braker.

Complainants further say that it is true, as alleged in the affidavit attached to the rule to show cause, that Complainants have not elected, so far as it was a ques-

Answer to Motion for Stay

tion of election, to intervene in the said suit brought by Conrad Morris Braker against the New York Finance Company and others. On the contrary, Complainants have always, and do now stand on their rights as citizens of Pennsylvania to have the adjudication of this Court upon any and all questions affecting their interests.

SECOND: Complainants admit that the motion of defendant made on November 10th, 1911, for an order staying all proceedings in this action was denied without prejudice; but Complainants are informed, believe and therefore aver that the said denial was upon the ground that Complainants were not made parties to said action, and that therefore proceedings in said action were not in any way relevant to this action, nor could any judgment or decree that might be entered therein be res adjudicata in this action.

THIRD: Complainants have not yet been served, either by publication or otherwise, with the Citation averred in the affidavit attached to the rule to show cause to have been issued on March 16th, 1912. Complainants, however, have obtained a copy of the petition upon which said Citation is claimed to have been granted. Said petition prays that a rule to show cause should issue against Complainants, among others, "why a decree should not be made settling the account of your petitioner as trustee of said trust fund, and determining the rights of the various parties among themselves, and directing to whom said fund of \$10,000 and the accumulated interest thereon shall be paid."

FOURTH: Complainants are advised by counsel, believe, and therefore aver, that the averments set forth in the affidavit attached to the rule to show cause are not sufficient to allow an entry of an order to stay in this action for the following reasons:

Answer to Motion for Stay

(a) The action pending in the Supreme Court of the County of New York is one in which Complainants are not parties, and consequently no judgment or decree entered in that action can be relevant in this action, or bind the parties hereto.

(b) This proceeding is one brought by Complainants as citizens of the State of Pennsylvania against Defendant as a citizen of the State of New York. The right to determine all questions affecting the title of Complainants to the said legacy held by Defendant as trustee in the Federal Courts is particularly, under the Constitution of the United States and the Judiciary Act, the province of this Court.

(c) The subsequent filing of an account in the Surrogate's Court by a trustee is no cause for the staying of an action already pending in this Court.

(d) The remedies open to the defendant, if he be aggrieved, are many: by filing a Cross Bill in this action, or in the Supreme Court, or by filing a proper Bill of Interpleader.

FIFTH: WHEREFORE Complainants pray that the rule to show cause heretofore granted in this action may be discharged.

(Signed)

JOHN A. S. BROWN.

(Signed)

FRANK E. SCHERMERHORN,
*As Trustee for Clara Schermerhorn,
under the Last Will and Testament
of Thomas Cunningham, deceased.*

Of Counsel.

Answer to Motion for Stay

EASTERN DISTRICT OF PENNSYLVANIA, ss.:

JOHN A. S. BROWN, and FRANK E. SCHERMERHORN, being duly sworn according to law, depose and say; that the facts set forth in the foregoing Answer to the Rule to Show Cause heretofore granted, so far as they are stated upon the knowledge of deponents are true, and so far as they are stated upon information and belief, deponents believe them to be true.

Sworn to and sub-	}	(Signed)
scribed before		JOHN A. S. BROWN.
me this 3rd day		(Signed)
of April, A. D.		FRANK E. SCHERMERHORN.

1912.

(Signed)

GEORGE KOPPENHOEFER, JR.,

(Seal) *Notary Public.*

My commission expires March 10, 1913.

WHEREAS, Conrad Morris Braker by an assignment and power of attorney, bearing date the 13th day of June, 1901, did assign, transfer and set over unto Frank L. Rabe, his heirs and assigns absolutely all his right, title and interest in and to a certain legacy of \$50,000 payable under the 14th Clause of the Last Will and Testament of Conrad Braker, Jr., deceased; and

WHEREAS, the said Frank L. Rabe by assignment dated October 1st, 1901, did assign, transfer and set over unto the New York Finance Company, a corporation incorporated and existing under the laws of the State of New York, all the said right, title and interest which was of Conrad Morris Braker, in and to the

Answer to Motion for Stay

legacy bequeathed by the 14th Clause of the said Last Will and Testament of Conrad Braker, Jr., deceased; and

WHEREAS, by assignment dated December 19th, 1906, the said New York Finance Company did make and deliver unto John A. S. Brown, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, its certain promissory note for the payment of the said sum of \$10,000, and as security for the payment of the said Note did also make, execute and deliver unto the said John A. S. Brown, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, inter alia, an assignment of all the right, title and interest which the said New York Finance Company acquired in and to the estate of Conrad Braker, Jr., deceased, by virtue of the assignment to the said Frank L. Rabe by Conrad Morris Braker, dated the 13th day of June, 1901; and

WHEREAS, thereafter, default having been made by the said New York Finance Company in the payment of the aforementioned Note, the said John A. S. Brown, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, did cause the aforementioned Collateral to the said Note to be sold at Public Sale on the 3rd day of May, 1911; and

WHEREAS, one Charles Z. Wolff became the purchaser at said sale; and

WHEREAS, on the 6th day of May, 1911, the said Charles Z. Wolff duly sold, transferred, set over and

Answer to Motion for Stay

assigned absolutely to the said John A. S. Brown, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, all and every the estate, right, title and interest of the said Conrad Morris Braker, which he had so acquired; and

WHEREAS, there has been paid by the said Austin B. Fletcher, as Trustee, from time to time, \$40,000 on account of the said legacy of \$50,000 held in trust by him as aforesaid, under the provisions of the 14th Clause of the Last Will and Testament of the said Conrad Braker, Jr., deceased; and

WHEREAS, there is still in the hands of the said Austin B. Fletcher, as Trustee under and by virtue of the aforementioned 14th Clause of the Last Will and Testament of the said Conrad Braker, Jr., deceased, the balance of the said legacy of \$50,000, to-wit, the sum of \$10,000; and

WHEREAS, by reason of the foregoing recitals all the right, title and interest which was of the New York Finance Company in the said balance of the said legacy is now vested absolutely in the said John A. S. Brown, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased.

NOW, THEREFORE, KNOW ALL MEN BY THESE PRESENTS, that the New York Finance Company, for and in consideration of the premises, has remised, released, quit-claimed and forever discharged, and by these presents does, for itself, and its successors, remise, release, quit-claim and forever discharge the said Austin B. Fletcher, as Trustee, his heirs, executors, administra-

Answer to Motion for Stay

tors and successors, and every of them, of and from all and all manner of actions, suits, debts, accounts, reckonings, claims and demands which the New York Finance Company now has against the said Austin B. Fletcher, as Trustee under and by virtue of the aforementioned 14th clause of the Last Will and Testament of Conrad Braker, Jr., deceased, his heirs, executors, administrators or successors, provided, however, that nothing herein contained shall be construed to operate as in any way affecting the interest of the said John A. S. Brown, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, in and to the estate of Conrad Braker, Jr., deceased, but this release is executed in order that all the right, title and interest which was in the New York Finance Company in and to the said 14th clause of the Last Will and Testament of Conrad Braker, Jr., deceased, shall, by these presents, be recognized and declared by the New York Finance Company to have been absolutely vested in the said John A. S. Brown, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased.

IN WITNESS WHEREOF, the New York Finance Company has caused these presents to be executed by its Treasurer, and the seal of the Company to be hereunto affixed, this Second day of April, A. D. 1912.

NEW YORK FINANCE COMPANY.

(Signed)

By WILLIAM E. FRITZ, (Seal)
Treasurer.

Answer to Motion for Stay

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } ss.:

On this 3rd day of April, A. D. 1912, before me, the subscriber, a Notary Public in and for the State of Pennsylvania, residing in the City and County of Philadelphia, personally appeared WILLIAM E. FRITZ, to me known, who, being by me duly sworn, did depose and say; that he resides in the City of Philadelphia; that he is the Treasurer of the New York Finance Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was said corporate seal; that it was so affixed by order of the Board of Directors of the said corporation, and that he signed his name thereto by like order.

(Signed)

GEORGE KOPPENHOEFER, JR., (Seal)
Notary Public.

My commission expires March 10, 1913.

(Indorsed: "E. 7-231. District Court of U. S., Southern District of New York. John A. S. Brown et al. vs. Austin B. Fletcher, etc. Answer of Complainants to Rule to Show Cause why proceedings herein should not be stayed. Fredric W. Frost, Charles H. Burr, of Counsel for Complainants. U. S. District Court. Filed Aug. 20, 1912, M., S. D. of N. Y.")

Answer

ANSWER.

CIRCUIT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schermernhorn, as Trustee, under
the Last Will and Testament of
Thomas Cunningham, deceased,
and a citizen of the State of Penn-
sylvania,*

against

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
under the Last Will and Testament
of Conrad Braker, Jr., deceased,
and a citizen of the State of New
York.*

In Equity.
E 7—231.

The answer of the above-named defendant to the bill of complaint of the above-named complainants respectfully shows to the Court:

I. The defendant admits the allegations contained in the several sections of the bill, numbered "Second," "Eighth," "Tenth," "Eleventh," "Twelfth" and "Thirteenth."

II. Defendant, further answering, avers that he has no knowledge or information sufficient to form a belief as to the several allegations set forth in each of the sections of the bill numbered "Ninth," "Fourteenth," "Fifteenth," "Sixteenth," "Seventeenth," "Eighteenth," "Nineteenth," and "Twentieth."

Answer

III. This defendant denies that Conrad Morris Braker became, on the 21st day of July, 1905, entitled to receive and have paid to him the balance (\$10,000.00) of the principal sum of the trust fund provided for him under the "Fourteenth" paragraph of the Will of Conrad Braker, Jr.; but defendant admits that Conrad Morris Braker is and was entitled to receive so much of that balance as may be found to be payable to him upon the accounting, by this defendant, with respect to said trust in the Surrogates' Court of the County of New York, now pending, and in which proceedings said complainants are cited to appear, and have been served with the citation.

IV. And affirmatively, and for a first defence herein this defendant alleges that before the commencement of this suit, namely, on or about the 2d day of February, 1911, Conrad Morris Braker instituted an action in the Supreme Court of the State of New York against the New York Finance Company, Frank L. Rabe, and this defendant; and by his complaint prayed for the judgment of the court that the assignment from him to said Frank L. Rabe (being the assignment referred to in the "Ninth" section of the bill of complaint herein); and the assignment from said Frank L. Rabe to the New York Finance Company (being the assignment referred to in the "Fifteenth" section of said bill of complaint), be declared void and of no effect; and that Frank L. Rabe and New York Finance Company be directed to deliver up and surrender the said assignments, and all other writings given by him (said Braker) in connection therewith to be cancelled; that his rights to said sum of \$10,000.00 held by Austin B. Fletcher, as his trustee, might be settled, and that said fund of \$10,000.00, with interest, be paid over to him, and that he should have such other and further

Answer

relief as might be just; and that Austin B. Fletcher, as testamentary trustee, be directed to pay over to him said fund of \$10,000.00, with interest. That attached hereto and made a part of this answer with the same purpose and effect as if fully and at large set forth is a copy of the complaint in said action, marked "Exhibit A."

That the said New York Finance Company made its answer in the said action, and therein set forth the establishment of the trust fund in favor of Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., that Austin B. Fletcher became the trustee to administer said trust; that, on the 13th day of June, 1901, Conrad M. Braker, in consideration of \$2,500.00 paid to him by Frank L. Rabe, sold to said Rabe all the estate, right, title, and interest, to which said Braker was entitled under the "Fourteenth" provision of said Will; that an instrument of assignment was made respecting the sale; that afterwards, on October 1, 1901, said Rabe, for certain good and valuable consideration, paid him by New York Finance Company, sold to it all the estate and right which said Rabe had in and to the interest of Conrad Morris Braker, under the "Fourteenth" section of his father's Will; and said New York Finance Company claimed that it thereupon became entitled to receive from the co-defendant, Austin B. Fletcher, the balance of the trust fund then payable, namely, the sum of \$10,000.00; and said answer demanded, among other things, that the defendant, Austin B. Fletcher, as testamentary trustee for Conrad M. Braker, pay to it such balance. A copy of said answer is hereto attached and made a part hereof, marked "Exhibit B."

That, upon the issues joined in the action, it came on for trial; and a judgment was rendered February

Answer

5, 1912, that the said assignment of June 13, 1901, was usurious and void; and, further, that the said instrument of assignment, dated October 1, 1901, from Frank L. Rabe to New York Finance Company was usurious and void; that Frank L. Rabe and New York Finance Company acquired no interest under said instrument of June 13, 1901, and October 1, 1901, in the legacy of \$10,000.00 payable to Conrad Morris Braker on July 21, 1910, under the Will of his father, Conrad Braker, Jr., deceased; that Frank L. Rabe and New York Finance Company deliver up and surrender said instrument of June 13, 1901, and said instrument of October 1, 1901, to be cancelled; that the Register of the County of New York cancel of record in his office the instrument dated June 13, 1901, from Conrad Morris Braker to Frank L. Rabe, and that the Surrogate of New York County cancel of record in his office the instrument dated June 13, 1901, from Conrad Morris Braker to Frank L. Rabe, and the instrument dated October 1, 1901, from Frank L. Rabe to New York Finance Company, insofar as it refers to said instrument of June 13, 1901; and it was further ordered that Austin B. Fletcher, this defendant, as testamentary trustee for Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., pay over to Conrad Morris Braker the fund of \$10,000.00, with the interest accumulated thereon from July 21, 1910. A copy of said judgment is hereto annexed, marked Exhibit C, and made a part of this answer with the same force and effect as if fully and at length set forth herein.

This defendant further alleges that it was only after the said cause of Conrad Morris Braker against the New York Finance Company was at issue that the discovery was made that the New York Finance

Answer

Company had assigned or attempted to assign to the complainants herein the right, title, interest in the estate of Conrad Braker, Jr., which they now claim to have received from New York Finance Company.

That shortly after making such discovery the attorney in said action for Conrad Morris Braker addressed the complainants by sending to John A. S. Brown the following letter:

April 29, 1911.

Mr. John A. S. Brown,
Franklin Building,
Philadelphia, Pa.

Dear Sir:

I am informed that you and Frank Schermerhorn, as trustees, loaned \$10,000.00 to the New York Finance Company in December, 1906, and received as collateral security therefor a note payable July 21, 1910, and an assignment from the New York Finance Company of certain legacies due Conrad Morris Braker under the will of his father Conrad Braker, Jr.

I represent Mr. Braker, who has commenced an action in the Supreme Court of this State to have the assignments made by him to Frank L. Rabe, which were assigned by Rabe to the New York Finance Company, of the aforesaid legacies declared null and void.

I did not learn until recently that the New York Finance Company had made an assignment to you and Frank E. Schermerhorn as trustees; and I write to ascertain whether you claim any present interest under said assignment, or whether the loan has been paid.

I will appreciate a prompt answer from you.

Very truly yours,
SAFFORD A. CRUMMEY.

Answer

And said attorney afterwards received from the complainants, through the complainant John A. S. Brown, the following reply:

Philadelphia, Pa., June 13th, 1911.

Safford A. Crummey, Esq.,
No. 165 Broadway,
New York City, N. Y.

Dear Sir:

I beg to acknowledge the receipt of your communication of April 29th, 1911.

Replying to same, I beg to advise you that on December 19th, 1906, I, in conjunction with Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, loaned to the New York Finance Company Ten Thousand Dollars (\$10,000) which was secured to us by the Company's note payable July 21st, 1910, and an assignment of certain of the Company's interests in the estate of Conrad Braker, Jr., deceased. This assignment fully sets forth the interests thus assigned to us, and is a matter of record in the Surrogate's Court of New York County; and you can refer to the same for further information in the matter.

I also beg to advise you that the New York Finance Company, having defaulted in the payment of this note, and certain interest due thereon, that Mr. Schermerhorn and myself caused the above mentioned collateral security to be sold at public auction, in this city; and that it was so sold to one Charles Z. Wolff. We have now taken title from Mr. Wolff to these interests, and are the legal owners and holders of the same.

We have notified the trustee of the Braker Estate, Mr. Austin B. Fletcher, that we hold these interests

Answer

as above, and also have demanded payment to us in the matter.

Yours very truly,

JNO. A. S. BROWN.

Defendant further says that shortly after the discovery was made that the complainants claimed to have an interest in the estate of Conrad Braker, Jr., and after the attorney for Conrad Morris Braker had received the above letter, said complainants essayed to sell the said interest in the estate of Conrad Braker by a pretended sale thereof, at public auction, on May 6, 1911, in the City of Philadelphia, to one Charles Z. Wolff, and on the same day and by a like transfer from said Wolff to the complainants. And this defendant will insist upon the trial of this suit that it was the evident purpose of the complainants to conceal the fact of their existence and of their claim and interest in the estate of Conrad Braker, Jr., under the "Fourteenth" clause of his Last Will and Testament, so as that they would not be compelled to become parties to the said action.

V. And for a second defence, this defendant alleges that this court has not cognizance of this suit, inasmuch as Conrad Morris Braker, referred to in the bill of complaint as the assignor of his certain interests under the "Fourteenth" section of the Will of his father, Conrad Braker, Jr., is and was, at the time of the commencement of this suit, a citizen of the State of New York, and that suit could not have been prosecuted in this court, if no assignment by him of his interests had been made.

VI. And for a third defense, this defendant alleges that upon its face the bill of complaint herein does not state facts sufficient to constitute a cause of action.

Answer

VII. And for a fourth defense, this defendant alleges that the New York Finance Company, a New York Corporation, is a necessary party, has a material interest in and should be made a party to this action.

VIII. And; for a fifth defense, this defendant alleges that Conrad Morris Braker, a citizen of the State of New York, resident at No. 523 West 150th Street, in the Borough of Manhattan and the City of New York, is materially interested in the event of the suit and is a necessary party, without whose presence a proper decree can not be made.

IX. For a sixth defense, that the bill is multifarious, in that it seeks to incorporate within it matters pertinent to another or other causes of action, as shown by paragraphs of the bill of complaint numbered "Tenth," "Eleventh," "Twelfth," "Thirteenth," "Fourteenth" and "Fifteenth," which relate wholly, or in great part, to other and separate trusts in the last will and testament of Conrad Braker, Jr., deceased; namely, to trusts provided for by the "fifteenth" and "sixteenth" clauses of said will—which trusts are entirely distinct from the trust provided for by the "fourteenth" clause of said will.

WHEREFORE, the defendant prays that the bill of complaint may be dismissed with costs.

AUSTIN B. FLETCHER,
*As Testamentary Trustee for Conrad
Morris Braker Under the Last Will
and Testamen^t of Conrad Braker,
Jr., Deceased.*

WILLIAM P. S. MELVIN,
*Solicitor for Defendant,
Austin B. Fletcher, as Trustee, etc.,
165 Broadway,
New York City.*

Answer

STATE OF NEW YORK,
SOUTHERN DISTRICT OF NEW YORK, }
COUNTY OF NEW YORK.

Austin B. Fletcher, being duly sworn, says: I am the defendant named in the bill of complaint, and so much of the foregoing answer as concerns my own acts and deeds is true to the best of my knowledge; and so much thereof as concerns the acts and deeds of any other person or persons, I believe to be true.

AUSTIN B. FLETCHER.

Sworn to before me this
23rd day of April, 1912.

JOHN G. DANIEL,
(Seal) *Notary Public*,
Kings County, No. 155.

Certificate filed in N. Y. Co., No. 76.

Kings County Register's No. 4783.

New York County Register's No. 3185.

Commission expires Mch. 30, 1913.

Answer

EXHIBIT "A."

SUPREME COURT, NEW YORK COUNTY.

Conrad Morris Braker,
Plaintiff,
against

*New York Finance Company, Frank
L. Rabe and Austin B. Fletcher, as
Testamentary Trustee for the said
Conrad Morris Braker, under the
Last Will and Testament of Con-
rad Braker, Jr.*

The complaint of the above-named plaintiff, by Safford A. Crummey, his attorney, hereby alleges:

1. That the defendant, New York Finance Company, is a corporation duly organized under the laws of the State of New York.
2. That on July 21st, 1890, Conrad Braker, Jr., late of the City and County of New York, the father of this plaintiff, died, leaving a Last Will and Testament dated February 20th, 1890, which was duly admitted to probate by one of the Surrogates of New York County, on or about September 13th, 1890.
3. That in and by the fourteenth clause of said Will the testator devised and bequeathed the sum of \$50,000 to Henry J. Braker, to hold the same in trust and to securely invest the same and to apply the interest or income on the same for the special benefit of this plaintiff, and to pay over the principal thereof to this plaintiff, as follows: \$20,000 at the expiration of

Answer

ten years from the date of the death of said testator; \$20,000 at the expiration of fifteen years from the date of the death of said testator, and \$10,000 at the expiration of twenty years from the date of the death of said testator.

4. That by an order and decree of the Surrogates' Court of New York County, entered the 16th day of November, A. D. 1897, the defendant, Austin B. Fletcher, was appointed testamentary trustee for the said plaintiff under the said Will of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker and to execute the unexecuted trusts of which Henry J. Braker was trustee under said Will.

5. That the said defendant, Austin B. Fletcher, accepted said trusts and came into possession of certain funds belonging to the trust estate, including said fund of \$50,000, of which the plaintiff was beneficiary, as aforesaid.

6. That this plaintiff, ten years after the death of his said father, namely, on or about July 21st, 1900, received from said defendant, Austin B. Fletcher, the sum of \$20,000 of said trust fund, leaving a balance then due of \$30,000 of said trust fund created in, under and by the 14th clause of the Will of said deceased.

7. That on or about the 13th of June, 1901, the defendant, New York Finance Company, loaned to this plaintiff the sum of \$2500.

8. That on or about June 13th, 1901, and as collateral security for said loan of \$2500, this plaintiff assigned and transferred all his right, title and interest in and to the balance of said legacy of \$50,000 bequeathed to him in, under and by the 14th clause of the Will of his said father, now deceased, as aforesaid;

Answer

namely, the sum of \$30,000; the said assignment, for convenience, being made to the defendant, Frank L. Rabe, who, as plaintiff, is informed and believes, was, at that time, and is now one of the stockholders and directors of the defendant, New York Finance Company.

9. That the said assignment from the plaintiff to the defendant, Frank L. Rabe, was made subject to a prior assignment bearing date January 25th, 1901, from this plaintiff to Henry R. Loeb, as collateral security for the repayment of a certain loan of \$5000 and interest, and subject, further to an assignment from this plaintiff to William H. Sage, bearing date January 11th, 1901, of the sum of \$8000, payable to this plaintiff on July 21st, 1905, under the terms of said Will of Conrad Braker, Jr., deceased.

10. That the said defendant, Frank L. Rabe, assigned to the defendant, New York Finance Company, by an assignment, dated October 1st, 1901, and recorded in Surrogates' Office of New York County in Liber 3, page 200, of Assignments of December 21st, 1906, at the request of New York Finance Company, all the right, title and interest of the said defendant, Frank L. Rabe, in the legacy bequeathed to this plaintiff under the 14th clause of the Will of said Conrad Braker, Jr., deceased, theretofore assigned by this plaintiff to the defendant, Frank L. Rabe, under the assignment hereinbefore described and dated June 13th, 1901.

11. That fifteen years after the date of the death of said Conrad Braker, Jr., namely, on or about July 21st, 1905, the said defendant, Austin B. Fletcher, as trustee as aforesaid paid to and for the account of this plaintiff the further sum of \$20,000 due under

Answer

the said 14th clause of the Will of the said Conrad Braker, Jr., deceased, at that date by paying to Henry R. Loeb the sum of \$5000; by paying to William H. Sage the sum of \$8000, and by paying to the said defendant, New York Finance Company, the balance of said sum of \$20,000, namely, the sum of \$7000, under the assignments hereinbefore mentioned and described.

12. That said payment of \$7000, made to the defendant, New York Finance Company, on or about July 21, 1905, on account of this plaintiff, was in repayment of the said loan of \$2500, made by the defendant, New York Finance Company, through the defendant, Frank L. Rabe, to this plaintiff, on June 13, 1901, with interest thereon, at the rate of 44 per cent. per annum, and said payment exceeded the amount due upon said loan with legal interest thereon, computed to the date of said payment, by the sum of at least \$3850.

13. That, in consideration of said loan, not exceeding \$2500, to the plaintiff and at the time thereof, the said defendant, New York Finance Company, illegally demanded, took and received the plaintiff's contract and agreement to repay to defendant, for said loan of \$2500 the sum of \$17,000 of July 21, 1910, which was at the rate of interest at least 64 per cent. per annum for said loan.

14. That said agreement, dated June 13, 1901, and re-assignment thereof, dated October 1, 1901, of said trust fund, to the extent of \$17,000, given as aforesaid, to secure said loan, not exceeding the sum of \$2500, and this plaintiff's said contract and agreement to pay said defendants, Frank L. Rabe and New York Finance Company, the sum of \$17,000 in satisfaction of said loan, were and are usurious and void.

Answer

15. That by reason of the premises, said defendants, Frank L. Rabe and New York Finance Company, acquired no interest in said legacy of this plaintiff by and under the Will of his said father, or in the fund held by the defendant, Austin B. Fletcher, in trust for this plaintiff, as aforesaid, or in any part thereof.

16. On information and belief, that on or about October 1, 1901, without the knowledge of this plaintiff, the said defendant, Frank L. Rabe, executed an instrument in writing, purporting to assign and transfer to the defendant, New York Finance Company, the interest in said legacy and trust fund said to have been assigned to the said defendant, Frank L. Rabe, by this plaintiff by the said assignment, dated June 13, 1901.

17. That, pursuant to the provisions of the 14th clause of the Will of said Conrad Braker, Jr., deceased, there was due and payable to this plaintiff, on July 21, 1910, the balance of \$10,000 of the legacy of \$50,000 bequeathed to this plaintiff in, under and by the 14th clause of said Will, which balance of said legacy, amounting to \$10,000, has not been paid to this plaintiff.

18. That thereafterwards and before the defendants, Frank L. Rabe and New York Finance Company, demanded from the defendant, Austin B. Fletcher, as trustee, as aforesaid, the payment of the amount claimed by the defendants Frank L. Rabe and New York Finance Company, under the alleged assignments, this plaintiff elected to avoid said assignments on the ground of usury, and notified the defendant, Austin B. Fletcher, as trustee, as aforesaid, that this plaintiff objected to the payment of any part of said trust fund on account of any alleged assignments to

Answer

said defendants, Frank L. Rabe and New York Finance Company.

19. That, if these assignments from this plaintiff to the defendant, Frank L. Rabe, and from the defendant, Frank L. Rabe, to the defendant, New York Finance Company, are declared void for usury, this plaintiff will be entitled to the said sum of \$10,000, bequeathed to this plaintiff in, under and by the 14th clause of the Will of the said father, free from any lien or claim of the defendants, Frank L. Rabe and New York Finance Company.

WHEREFORE, the plaintiff demands judgment; that the said assignment from this plaintiff to the defendant, Frank L. Rabe, and from the defendant, Frank L. Rabe, to the defendant, New York Finance Company, be declared void and of no effect; and that said defendants, Frank L. Rabe and New York Finance Company, be directed to deliver up and surrender the said assignments and all other writings given by this plaintiff in connection therewith to be cancelled; that this plaintiff's rights to said sum of \$10,000, now held by the defendant, Austin B. Fletcher, as trustee for this plaintiff, may be settled; and that said fund of \$10,000 with interest be paid over to this plaintiff; that this plaintiff have such other and further relief as may be just besides the costs of this action; and that said Austin B. Fletcher, as testamentary trustee, as aforesaid, be directed to pay over to this plaintiff said fund of \$10,000, with interest.

SAFFORD A. CRUMMEY,
Attorney for Plaintiff,
Office and Post Office Address,
165 Broadway,
Borough of Manhattan,
New York City.

Answer

EXHIBIT "B."

SUPREME COURT, NEW YORK COUNTY.

Conrad Morris Braker,
Plaintiff,
against

*New York Finance Company, Frank
L. Rabe and Austin B. Fletcher, as
Testamentary Trustee for the said
Conrad Morris Braker, under the
Last Will and Testament of Con-
rad Braker, Jr.*

Defendants. }

The defendant, New York Finance Company, by Asa L. Carter, its attorney, makes this its answer to the complaint of the plaintiff herein, and alleges as follows:

FIRST.—It admits the allegations of the paragraph marked "1" of the complaint herein.

SECOND.—It admits the allegations of the paragraph marked "2" of the complaint herein.

THIRD.—It admits the allegations of the paragraph marked "3" of the complaint herein.

FOURTH.—It admits the allegations of the paragraph marked "4" of the complaint herein.

FIFTH.—It admits the allegations of the paragraph marked "5" of the complaint herein.

Answer

SIXTH.—It admits the allegations of the paragraph marked "6" of the complaint herein.

SEVENTH.—It denies the allegations of the paragraph marked "7" of the complaint herein.

EIGHTH.—It admits that on or about June 13, 1901, the plaintiff herein assigned and transferred to this defendant, by a certain mesne assignment, all his right, title and interest in and to the balance of the certain legacy of \$50,000, bequeathed to him in, under and by the 14th clause of the Will of his father, Conrad Braker, Jr., deceased; namely, the sum of \$30,000, subject, however, to certain prior assignments thereof.

Excepting as thus admitted, this defendant denies each and every of the allegations of the paragraph marked "8" of the complaint herein.

NINTH.—It admits the allegations of the paragraph marked "9" of the complaint herein.

TENTH.—It admits the allegations of the paragraph marked "10" of the complaint herein.

ELEVENTH.—It admits the allegations of the paragraph marked "11" of the complaint herein.

TWELFTH.—It denies the allegations of the paragraph marked "12" of the complaint herein.

THIRTEENTH.—It denies the allegations of the paragraph marked "13" of the complaint herein.

FOURTEENTH.—It denies the allegations of the paragraph marked "14" of the complaint herein.

FIFTEENTH.—It denies the allegations of the paragraph marked "15" of the complaint herein.

SIXTEENTH.—It admits the allegations of the paragraph marked "16" of the complaint herein except-

Answer

ing the allegation that the assignment herein particularly referred to was made without the knowledge of the plaintiff, and as to such last mentioned allegation this defendant alleges it has no knowledge nor information sufficient to form a belief as to the truth thereof, and it therefore denies the same.

SEVENTEENTH.—It admits the allegations of the paragraph marked "17" of the complaint herein.

EIGHTEENTH.—It alleges that it has no knowledge nor information sufficient to form a belief as to the truth of the allegations of the paragraph marked "18" of the complaint herein; and it therefore denies the same.

NINETEENTH.—It alleges that it has no knowledge nor information sufficient to form a belief as to the truth of the allegations of the paragraph marked "19" of the complaint herein; and it therefore denies the same.

TWENTIETH.—And, further answering the said complaint, this defendant alleges as follows, to wit:

That heretofore, to wit: on or about the 21st day of July, 1890, one Conrad Braker, Jr., departed this life, leaving a Last Will and Testament in writing, bearing date the 20th day of February, 1890.

That the said Conrad Braker, Jr., at the time of his decease, was a resident of the City, County and State of New York; and after his decease his aforementioned Last Will and Testament was duly admitted to probate as a Will of Real and Personal Estate by the Surrogates' Court of the aforementioned County of New York, and there recorded in Book of Wills, No. 435, at page 383 and following.

That in and by the "Fourteenth" paragraph of the said Will the aforementioned Conrad Braker, Jr.,

Answer

did give and bequeath to Henry J. Braker the sum of \$50,000 in trust for the special benefit of the son of said testator, Conrad Morris Braker, as follows: To pay over to the said Conrad Morris Braker the interest or increase on the same so long as he shall live; \$20,000 of said principal sum if the said Conrad Morris Braker should be living at the expiration of ten years from the date of the decease of the said decedent; \$20,000 of said principal sum if the said Conrad Morris Braker should be living at the expiration of fifteen years from the date of the decease of the said decedent; the remaining \$10,000 of said principal sum if the said Conrad Morris Braker should be living at the expiration of twenty years from the date of the decease of the said decedent.

That prior to the 13th day of June, 1901, the plaintiff herein, Conrad Morris Braker, offered to sell to the defendant herein, Frank R. Rabe, a certain part or portion of his aforementioned interest in the aforementioned estate of Conrad Braker, Jr., deceased; and on the 13th day of June, 1901, the said plaintiff, for the consideration of \$2500 then paid to him by the defendant, Frank L. Rabe, did sell to the defendant, Frank L. Rabe, and the said defendant, Frank L. Rabe, did then buy from the said plaintiff, Conrad Morris Braker, a certain part or portion of the plaintiff's said interest in the said estate of Conrad Braker, Jr., deceased, to wit: all the estate, right, title and interest of, in and to the aforementioned principal sum of \$50,000 to which the said plaintiff, Conrad Morris Braker, then and there entitled to, under and by virtue of the aforementioned "Fourteenth" clause of the said Last Will and Testament of the said Conrad Braker, Jr., deceased, subject only to the payment of \$5000 to one Henry R. Loeb, with interest

Answer

from January 25, 1902, and the sum of \$8000 to William H. Sage, together with his expenses in the collection of the same.

That on the said 13th day of June, 1901, for the aforementioned consideration of \$2500 then and there paid to him by the said defendant, Frank L. Rabe, the said plaintiff, Conrad Morris Braker, executed and delivered unto the said defendant, Frank L. Rabe, a certain instrument in writing, dated that day, wherein and whereby the said plaintiff did sell and assign to the said defendant, Frank L. Rabe, the plaintiff's aforementioned estate of Conrad Morris Braker, Jr., deceased, as aforesaid; all of which fully appears by the said instrument, a copy of which is hereunto annexed, marked Exhibit "A," with the same force and effect as if herein set forth full and at large.

That thereafter and on the first day of October, 1901, and by a certain instrument in writing, bearing date of that day, the said Frank L. Rabe, for a certain good and valuable consideration, then and there paid to him by this defendant, New York Finance Company, did grant, bargain, sell, assign, transfer and set over unto this defendant, New York Finance Company, all the certain estate, right, title and interest of the said Frank L. Rabe in and to the interest of the aforementioned Conrad Morris Braker, Jr., under the aforementioned "Fourteenth" clause of the "Will" of the said Conrad Braker, Jr., deceased, and of and all and every part and parcel thereof; all of which fully appears by the certain instrument of assignment then and there executed and delivered by the said Frank L. Rabe to the said New York Finance Company, a copy of which is hereunto annexed, marked Exhibit "B," with the same force and effect as if herein set forth fully and at large.

Answer

That by reason of the foregoing this defendant, New York Finance Company, became entitled to receive for its own uses and purposes, and did receive on or about July 21, 1905, for its own uses and purposes, from the defendant, Austin B. Fletcher, as trustee as aforesaid, the certain sum of \$7000 of the said estate of the plaintiff herein, in and to the estate of the aforementioned Conrad Braker, Jr., deceased, then and there due and payable under the aforementioned "Fourteenth" paragraph of the said decedent's Last Will and Testament.

That by reason of the foregoing this defendant, New York Finance Company, became entitled to receive, and should have received on the 21st day of July, 1910, and is still entitled to receive from the defendant, Austin B. Fletcher, as trustee as aforesaid, the further part or portion of the estate of Conrad Braker, Jr., deceased, to wit: the balance of the aforementioned legacy of \$50,000 due to this plaintiff, amounting to \$10,000.

WHEREFORE this defendant, New York Finance Company, demands judgment as follows, to wit:

1st. That the complaint herein be dismissed as to this defendant, New York Finance Company.

2nd. That the defendant, Austin B. Fletcher, as testamentary trustee for the said Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., deceased, to pay to this defendant, New York Finance Company, the balance of \$10,000, now due and payable to it, as hereinbefore specifically set forth and prescribed, together with all interest, income or other accretions thereon, from the 21st day of July, 1910.

Answer

3rd. That this defendant do recover its costs and disbursements in this action, as to this Court may seem just and proper.

4th. That this defendant have such other and further relief in the premises as may be just and proper, and as in equity and at law it may be entitled to receive.

ASA L. CARTER,
Attorney for Defendant,
New York Finance Company,
Post Office Address,
60 Wall Street,
New York City.

Answer

EXHIBIT "C."

At a Special Term, Part IV, of the Supreme Court, held in and for the County of New York, at the County Court House, in the Borough of Manhattan, City and County of New York, on the 5th day of February, 1912.

Present: HON. SAMUEL GREENBAUM, Justice.

Conrad Morris Braker,
Plaintiff,
against

*New York Finance Company, Frank
L. Rabe and Austin B. Fletcher, as
Testamentary Trustee for the said
Conrad Morris Braker, under the
Last Will and Testament of Con-
rad Braker, Jr.*

Defendants.

The defendants, Frank L. Rabe and New York Finance Company, having voluntarily appeared in this action, by their duly authorized attorney, Asa L. Carter, Esq., and the defendant, Austin B. Fletcher, as Testamentary Trustee for the said Conrad Morris Braker, under the last Will and Testament of Conrad Braker, Jr., having appeared herein, by his attorney, William P. S. Melvin, Esq., and the defendant New York Finance Company and the defendant Austin B. Fletcher, as testamentary trustee, etc., having also made and served their respective answers herein, and the defendant, Frank L. Rabe, having failed to plead;

Answer

and this action having been regularly brought on for trial and been duly tried by this Court, at Special Term, Part IV, thereof; and the plaintiff having appeared upon said trial by Safford A. Crummey, his attorney; and the defendant New York Finance Company having appeared upon said trial by its attorney, Asa L. Carter, Esq., and the defendant Austin B. Fletcher, as Testamentary Trustee, etc., having appeared upon said trial by his attorney, William P. S. Melvin, Esq., and the Court, having made and filed its decision, stating separately its Findings of Facts and Conclusions of Law; it is now, upon motion of Safford A. Crummey, Esq., attorney for the plaintiff Conrad Morris Braker, and after hearing Asa L. Carter, Esq., attorney for the defendant New York Finance Company and William P. S. Melvin, attorney for the defendant Austin B. Fletcher, as testamentary trustee, etc., it is hereby

ORDERED, ADJUDGED and DECREED, that the agreement between the plaintiff and Arthur W. Depue and associates, entered into on or about June 1, 1901, whereby Arthur W. Depue and associates agreed to loan to the plaintiff the sum of \$2500.00 and to receive therefor from the plaintiff out of the estate of Conrad Braker, Jr., deceased, the sum of \$7000.00 on July 21, 1905, and the further sum of \$10,000.00 on July 21, 1910, was and is usurious and void; and it is further

ORDERED, ADJUDGED and DECREED, that the instrument, dated June 13, 1901, executed by the plaintiff to Frank L. Rabe, being Plaintiff's Exhibit "A" in evidence, which upon its face purports, in consideration of the sum of one dollar, to sell, assign, transfer and set over unto Frank L. Rabe any and all the estate, right, title and interest of the plaintiff in and to the principal sum of \$50,000.00, to which he was entitled

Answer

under and by virtue of the 14th clause of the Last Will and Testament of Conrad Braker, Jr., deceased, to wit: the sum of \$20,000.00 due to the plaintiff on July 21, 1905; and the sum of \$10,000.00 due the plaintiff on July 21, 1910, subject to the payment on July 21, 1905, of the loan of \$5000.00, made to the plaintiff by Mehry R. Loeb, and subject to the payment to William H. Sage, on July 21, 1905, of \$8000.00, was and is a mere cover for an usurious transaction and was and is usurious and void; and it is further

ORDERED, ADJUDGED and DECREED, that the instrument dated October 1, 1901, executed by Frank L. Rabe to the defendant New York Finance Company, being Plaintiff's Exhibit "B" in evidence, which upon its face purports, in consideration of \$10,000.00, to sell, assign, transfer and set-over unto the defendant New York Finance Company all the right, title and interest of said Frank L. Rabe of, in and to the interest of the plaintiff, under clause 14th of the Will of Conrad Braker, Jr., deceased, described in Plaintiff's Exhibit "A" in evidence, insofar as it refers to the said instrument of June 13, 1901, executed by the plaintiff to Frank L. Rabe was and is a mere cover for an usurious transaction and was and is usurious and void; and it is further

ORDERED, ADJUDGED and DECREED, that the defendants Frank L. Rabe and New York Finance Company acquired no interest under said instrument of June 13, 1901, Plaintiff's Exhibit "A," and October 1, 1901, Plaintiff's Exhibit "A" in said legacy of \$10,000.00, payable to him July 21, 1910, by and under the will of his father Conrad Braker, Jr., deceased, now held in trust for said plaintiff by the defendant Austin B. Fletcher, or any part thereof; and it is further

Answer

ORDERED, ADJUDGED and DECREED, that the defendants Frank L. Rabe and New York Finance Company deliver up and surrender said instrument of June 13, 1901, Plaintiff's Exhibit "A" and said instrument of October 1, 1901, Plaintiff's Exhibit "B," to be cancelled; and it is further

ORDERED, ADJUDGED and DECREED, that the Register of the County of New York cancel of record the instrument dated June 13, 1901, from Conrad Morris Braker to Frank L. Rabe recorded in his office in Liber 4 of "Miscellaneous Instruments," page 125, on June 28, 1901; and that the Surrogate of New York County cancel of record the instrument dated June 13, 1901, from Conrad Morris Braker to Frank L. Rabe, recorded in his office December 21, 1906, in Liber 3 of "Record of Conveyances and Mortgages of interest in Decedents' Estates," page 190, and the instrument dated October 1, 1901, from Frank L. Rabe to New York Finance Company, recorded in his office December 21, 1906, in Liber 3 of "Record of Conveyances and Mortgages of Interest in Decedents' Estates," page 200, insofar as it refers to said instrument of June 13, 1901, executed by Conrad Morris Braker to Frank L. Rabe, recorded December 21, 1906, in the office of the Surrogate of New York County, in Liber 3 of "Record of Conveyances and Mortgages of Interest in Decedents' Estates," page 190; and it is further

ORDERED, ADJUDGED and DECREED, that the defendant Austin B. Fletcher, as testamentary trustee, for the said Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., pay over to the plaintiff Conrad Morris Braker the fund of \$10,000.00, now held by him as said trustee, with the in-

Answer

terest accumulated thereon from July 21, 1910; and it is further

ORDERED, ADJUDGED and DECREED, that the defendant New York Finance Company pay to the plaintiff Conrad Morris Braker, the amount of his costs and disbursements \$138.03, and the allowance made by the Court as taxed, amounting to \$250.00, making in all the amount of \$388.03, and that he have execution against the said defendant New York Finance Company therefor; and it is further

ORDERED, ADJUDGED and DECREED, that the defendant Austin B. Fletcher, as testamentary trustee of the said Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., have the amount of his costs and disbursements as taxed, amounting to \$105.00.

Enter,

S. G.,
J. S. C.

WILLIAM F. SCHNEIDER,
Clerk.

(Indorsed: "E7-231. Circuit Court of the United States for the Southern District of New York. John A. S. Brown, et al., vs. Austin B. Fletcher, as trustee, &c. Answer. William P. S. Melvin, Solicitor for deft. 165 Broadway, New York City, N. Y. U. S. District Court Filed Apr. 23, 1912, S. D. of N. Y. Due service of copy of within Answer is hereby admitted this 23rd day of April, 1912. Fredric W. Frost, Solicitor for Compls.")

Replication

REPLICATION.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK.

*John A. S. Brown, and Frank E.
Schermernhorn, as Trustee for
Clara Schermernhorn Under the
Last Will and Testament of
Thomas Cunningham, Deceased,*
Complainants,

against

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Bra-
ker, Under the Last Will and
Testament of Conrad Braker,
Jr., Deceased,*
Defendant.

Sess. 1911,
In Equity.
E. 7. 231.

These repliants, saving and reserving to them-
selves all and all manner of advantage of exception,
which may be had and taken to the manifold errors,
uncertainties, and insufficiencies of the answer of the
said defendant, for replication thereunto, say, that
they do and will aver, maintain, and prove their said
bill to be true, certain, and sufficient in the law to be
answered unto by the said defendant, and that the
answer of the said defendant is very uncertain, evasive,
and insufficient in law, to be replied unto by these
repliants; without that, that any other matter or thing
in the said answer contained, material or effectual in
the law to be replied unto, confessed or avoided,
traversed or denied, is true; all which matters and
things these repliants are ready to aver, maintain,

Replication

and prove as this Honorable Court shall direct, and humbly pray as in and by their said bill they have already prayed.

FREDRIC W. FROST,
Attorney for Complainants.

(Endorsed: "District Court, Southern District of New York. Equity, 7-231. John A. S. Brown and Frank E. Schermerhorn, etc., plaintiff, against Austin B. Fletcher, etc., defendant. Replication. Fredric Worthen Frost, attorney for complainants, No. 60 Wall Street, New York, N. Y. Service of a copy of the within is hereby admitted. Dated May 12th, 1912. Wm. P. S. Melvin, atty. for deft. U. S. District Court. Filed May 13, 1912. S. D. of N. Y.")

Order Re Complainants' Testimony

ORDERS RE COMPLAINANTS' TESTIMONY.

DISTRICT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schermerhorn as Trustee for Clara
Schermerhorn, under the Last Will
and Testament of Thomas Cunning-
ham, deceased, and a citizen of the
State of Pennsylvania,*

Complainants,

vs.

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
under the Last Will and Testament
of Conrad Braker, Jr., deceased, and
a citizen of the State of New York,*

Defendant.]

And now this 26th day of June, 1912, upon consid-
eration of the annexed affidavits, and upon motion of
Frederic W. Frost, Solicitor for Complainant, it is
hereby

ORDERED that the defendant herein shall show
cause at three P. M. before me, in my Chambers in
the Post Office Building in the City of New York, why
an order should not be entered enlarging the time for
the taking of complainants' testimony in the above en-
titled cause so that the same shall be taken and con-
cluded in chief not later than the 30th day of June,
1912, inclusive. Said order entered nunc pro tunc as
of June 10, 1912.

Service of a copy hereof upon counsel for defend-
ant at his office shall be sufficient, on or before June
26th at one P. M.

LEARNED HAND,

D. J.

Orders Re Complainants' Testimony

DISTRICT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schmerhorn as Trustee for Clara
Schmerhorn, under the Last Will
and Testament of Thomas Cunning-
ham, deceased, and a citizen of the
State of Pennsylvania,*

Complainants,

vs.

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
under the Last Will and Testament
of Conrad Braker, Jr., deceased, and
a citizen of the State of New York,*

Defendant.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

CHARLES H. BURR, being duly sworn, deposes and says: That he is of counsel in the above entitled cause; that he is a member of the bar of Philadelphia, and of the Supreme Court of the United States, but is not a member of the bar of New York; that he has had in charge the taking of testimony in this cause, and that he believed the rule applicable thereto is Rule 67 of Equity Rules of the Supreme Court of the United States; that he was not aware of the additional Equity Rule of this Court; that in view of the fact that this case could not be heard until after the summer vacations deponent delayed the taking of testimony until this date; that the testimony to be taken on behalf of

Orders Re Complainants' Testimony

the complainant is purely documentary and consists of the documents attached to the Bill of Complaint as exhibits.

Sworn and subscribed to }
before me this 26th day } CHARLES H. BURR.
of June, 1912.

JULIA LEVY,

Notary Public Queens County, No. 16.

Certificate filed in New York County.

(Indorsed: "U. S. District Court. Southern District of N. Y. John A. S. Brown et ano., etc. Complainants, against Austin B. Fletcher, etc., Defendant. Affidavit and Order to Show Cause and Affidavit of Service. Fredric Worthen Frost, Solicitor for Complainants. No. 60 Wall Street, New York, N. Y. Due service of a copy of the within is hereby admitted. Dated — 19—. U. S. District Court, Filed June 27, 1912, S. D. of N. Y.")

Orders Re Complainants' Testimony

DISTRICT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schermmerhorn as Trustee for Clara
Schermmerhorn, under the Last Will
and Testament of Thomas Cunning-
ham, deceased, and a citizen of the
State of Pennsylvania,*

Complainants,

vs.

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
under the Last Will and Testament
of Conrad Braker, Jr., deceased, and
a citizen of the State of New York,*
Defendant.

And now this 26th day of June, 1912, upon consid-
eration of the order to show cause and affidavit at-
tached thereto heretofore granted this 26th day of
June, 1912, and upon return of said order to show
cause and proof of due service thereof, it is hereby

ORDERED nunc pro tunc as of June 10, 1912, that
the time for the taking of complainant's testimony in
the above entitled cause shall be enlarged so that the
same shall be taken and concluded in chief not later
than the 30th day of June, 1912, inclusive.

LEARNED HAND,

D. J.

Orders Re Complainants' Testimony

(Indorsed: "United States District Court. Southern District of New York. John A. S. Brown, etc. and Frank E. Schermerhorn, etc., Complainants, against Austin B. Fletcher as Testamentary Trustee, etc. Order. Fredric Worthen Frost, Solicitor for Complainants, No. 60 Wall Street, New York, N. Y. Due service of a copy of the within is hereby admitted. Dated — 19—. —")

Complainants' Testimony

COMPLAINANTS' TESTIMONY.

DISTRICT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*John A. S. Brown, a Citizen of the
State of Pennsylvania, and
Frank E. Schermerhorn as Trust-
tee for Clara Schermerhorn,
Under the Last Will and Testa-
ment of Thomas Cunningham,
Deceased, and a Citizen of the
State of Pennsylvania,*
Complainants,

vs.

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Bra-
ker, Under the Last Will and
Testament of Conrad Braker,
Jr., Deceased, and a Citizen of
the State of New York,*
Defendant.

Testimony taken before William Parkin, one of
the standing examiners of this court, pursuant to the
annexed notice at his office in the Post-Office Building,
on the twenty-sixth day of June, 1912.

Appearances: MR. FREDRIC W. FROST, and
MR. CHARLES H. BURR, for complainant,
WILLIAM P. S. MELVIN, attorney for
Austin B. Fletcher, defendant.

Objection being made by Mr. Melvin on behalf of
Austin B. Fletcher for the taking of any testimony on
the part of the complainant, inasmuch as more than
thirty days time have elapsed since the filing of the
replication herein, and that pursuant to rule 2 of the

Complainants' Testimony

equity rules of the court, the time has not been enlarged or varied by special order or consent.

The hearing is adjourned by direction of the examiner to three o'clock today.

3 o'clock P. M.

Present as before.

MR. MELVIN: Counsel for defendant objects to proceeding with the taking of depositions inasmuch as the order for proceeding is based upon an order to show cause returnable at 3 P. M., without a statement as to what date, and the order itself bears no date.

Mr. Burr offers to go at once before Judge Hand affording Mr. Melvin any opportunity he may desire to object to the order.

MR. BURR: I offer in evidence assignment by Conrad Morris Braker to Frank L. Rabe, dated June 13, 1901, recorded in the Surrogates' Office in the County of New York in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 190, on December 21, 1906.

MR. MELVIN: Objected to as irrelevant, incompetent and immaterial and not executed, acknowledged, and recorded in accordance with the laws of this state.
(Marked Complainants' Exhibit No. 1 of this date.)

MR. BURR: I offer in evidence assignment by Conrad M. Braker to Frank L. Rabe dated April 18, 1901, recorded in the office of the Surrogate of the County of New York in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 195, on the twenty-first day of December, 1906.

MR. MELVIN: Objected to as irrelevant, incompetent and immaterial and not executed, acknowledged, and recorded in accordance with the laws of this state.
(Marked Complainants' Exhibit 2 of this date.)

Complainants' Witness, Charles H. Burr, Direct

CHARLES H. BURR, a witness on behalf of the complainant, being first duly sworn, testified as follows in answer to interrogatories propounded by Mr. Frost:

Q. 1. Mr. Burr, were you an officer of the New York Finance Company on the nineteenth day of December, 1906?

A. I was not an officer; I was a director.

Q. 2. And who was president of the company at that time?

A. Arthur W. Depue.

Q. 3. Do you know the handwriting of Mr. Depue?

A. I do; I have often seen him write.

Q. 4. Do you know the seal of the New York Finance Company?

A. I do.

Q. 5. I show you a paper and ask you what it is.

A. Promissory note made by the New York Finance Company, executed by the corporation by Arthur W. Depue, president. The seal of the corporation is attached. I know the signature of Arthur W. Depue, and the signature attached to the note is his signature. I also know the seal of the New York Finance Company, being attached to the note and the seal of that company.

MR. FROST: I offer it in evidence.

MR. MELVIN: I move to strike out so much of the answer as states that the note was "executed by the corporation by Arthur W. Depue, president. Also I know the signature of Arthur W. Depue and the signature attached to the note is his signature. I also know the seal of the New York Finance Company, being attached to the note and the seal of that company," as being not responsive to the question and as voluntary. I object to this promissory note as to its execution as irrelevant, immaterial and incompetent.

Complainants' Witness, Charles H. Burr, Direct

(Paper marked Complainants' Exhibit 3 of this date.)

MR. BURR: I offer myself for cross-examination now.

(Defendant's counsel states that he does not wish to cross-examine Mr. Burr at this time.)

MR. FROST: I offer in evidence an assignment from Frank L. Rabe to the New York Finance Company, dated October 1st, 1901, and recorded in the office of the Surrogate of the County of New York in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates at page 200, on the twenty-first day of September, 1906.

MR. MELVIN: Objected to as irrelevant, incompetent and immaterial and not executed, acknowledged, and recorded in accordance with the laws of this state.

(Paper marked Complainants' Exhibit 4 of this date.)

MR. FROST: I offer in evidence an assignment dated January 4th, 1907, from Frank L. Rabe to the New York Finance Company and recorded in the office of the Surrogate of the County of New York in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 236, on the fourteenth day of January, 1907.

MR. MELVIN: Objected to as irrelevant, incompetent and immaterial and not executed, acknowledged, and recorded in accordance with the laws of this state.

(Paper marked Complainants' Exhibit 5 of this date.)

MR. FROST: I offer in evidence an assignment from John A. S. Brown and Frank E. Schermerhorn as trustee, etc., to Charles Z. Wolff, dated the sixth day of May, 1911, and recorded in the office of the Surrogate of the County of New York in Liber 10 of Convey-

Complainants' Witness, Charles T. Butler, Direct

ances and Mortgages of Interests in Decedents' Estates, page 27, on the sixth day of June, 1911.

MR. MELVIN: Objected to as irrelevant, incompetent and immaterial and not executed, acknowledged, and recorded in accordance with the laws of this state.

(Paper marked Complainants' Exhibit 6 of this date.)

MR. FROST: I offer in evidence an assignment from Charles Z. Wolff to John A. S. Brown and Frank E. Schermerhorn, dated May 6, 1911, and recorded in the office of the Surrogate of the County of New York in Liber 10 of Conveyances and Mortgages of Interests in Decedents' Estates, page 2, on the sixth day of June, 1911.

MR. MELVIN: Objected to as irrelevant, incompetent and immaterial and not executed, acknowledged, and recorded in accordance with the laws of this state.

(Paper marked Complainants' Exhibit 7 of this date.)

(Adjourned to June 27, 1912, at 3 P. M.)

New York, June 27, 1912, 3 P. M.

Met pursuant to adjournment.

Present: Counsel as before.

CHARLES T. BUTLER, a witness called in behalf of the complainant, having been duly sworn, testified as follows in answer to interrogatories propounded by Mr. Frost:

Q. 1. What is your business?

A. Record Clerk.

Q. 2. Where?

A. New York County Surrogate's Office.

Q. 3. You have been subpoenaed to produce one

Complainants' Witness, Charles T. Butler, Direct

of the regular books of record of the Surrogate's Clerk of New York County, have you?

A. I have.

Q. 4. I show you a book and ask you what it is?

A. Liber No. 3 Regular Conveyances and Mortgages of Interests of Decedents' Estates.

Q. 5. This is one of the records of the Surrogate of New York County, is it?

A. It is.

Q. 6. Referring to page 204 of this record, I ask you what appears thereon?

A. The record of an assignment.

Q. 7. This continues from pages 204 down to and including page 207, does it not?

A. It does.

Q. 8. And I ask you on what date this is recorded?

A. Twenty-first day of December, '06.

MR. FROST: I offer this record on pages 204, 5, 6 and the top of 207 in evidence, and ask to substitute therefor in the records before the master copy of the same.

MR. MELVIN: That is objected to. If the purpose be to introduce evidence of some assignment, of any of the assignments that are described in the bill of complaint; it is objected to also because it is immaterial and incompetent and irrelevant, and not acknowledged, executed and recorded in the manner required by law.

(A paper containing what purported to be a copy of the record was compared with it and found to be alike, by counsel for both parties.)

MR. FROST: I ask you to have the original in the record marked in evidence and that the copy which has just been compared be used as the copy from the record.

(The original constitutes Complainants' Exhibit 8

Complainants' Witness, Charles H. Burr, Direct

and the copy is marked for identification Complainants' Exhibit 8A.)

MR. MELVIN renews his objection, on the same grounds previously stated.

(The averments of paragraph third of the bill are admitted by counsel for the defendant.)

(The averments of paragraph fourth, fifth, sixth and seventh are also admitted by counsel for defendant.)

(It is admitted by counsel for defendant that defendant as substituted trustee received from Henry J. Braker, testamentary trustee under the last will and testament of Conrad Braker, Jr., deceased, the \$50,000 named in the fourteenth paragraph of said will.)

MR. BURR, recalled.

By MR. FROST:

Q. 6. Referring to Complainants' Exhibit 1 which I now show you, I ask you if you are familiar with the handwriting of Conrad Morris Braker?

A. I am.

Q. 7. I ask you if you ever saw him write his name?

A. I have.

Q. 8. And do you know his signature?

A. I do.

Q. 9. Is that his original signature affixed to Complainants' Exhibit 1 (showing witness paper)?

A. Yes, that is the signature of Conrad Morris Braker.

Q. 10. Do you find it there more than once?

A. Yes, both signatures are those of Conrad Morris Braker. One to the assignment and one to the receipt.

Complainants' Witness, Charles H. Burr, Direct.

MR. FROST: I re-offer this in evidence.

MR. MELVIN: Same objection. Objected to on the ground that it is irrelevant, incompetent and immaterial and not executed, acknowledged and recorded in accordance with the laws of this state.

Q. 11. I show you Complainants' Exhibit No. 2 and ask you if that is the original signature at the end of that paper of Conrad Morris Braker?

A. It is.

Q. 12. Do you find it twice on the paper?

A. I do.

Q. 13. Please state where you find it?

A. First at the end of the assignment and again on the receipt.

MR. FROST: I re-offer it in evidence.

(Objected to as irrelevant, incompetent and immaterial and not executed, acknowledged and recorded in accordance with the laws of this state.)

Q. 14. Referring to Complainants' Exhibit No. 4 I ask you if you are familiar with the handwriting of Frank L. Rabe?

A. I am.

Q. 15. Did you ever see him write his name?

A. Very often.

Q. 16. Is that his signature at the end of that document?

A. It is.

MR. FROST: I re-offer this paper in evidence.

MR. MELVIN: Objected to as incompetent, irrelevant and immaterial and not executed, acknowledged and recorded in accordance with the laws of this state.

Q. 17. Referring to Complainants' Exhibit No. 5 I ask you if that is the original signature of Frank L. Rabe at the end of that document?

Complainants' Witness, Charles H. Burr, Direct

A. It is.

Mr. Fayer: I re-offer this paper in evidence.

Mr. Mearns: Objected to as irrelevant, incompetent and immaterial, and not examined and acknowledged in accordance with the laws of this state and not within the issues in this action.

Q. 18. Referring to Complainants' Exhibit No. 6, I ask you if you are familiar with the handwriting of John A. S. Brown; also with the handwriting of Frank E. Schormachers? Have you seen each of these parties write their names?

A. I have, very often.

Q. 19. Are those the original signatures of John A. S. Brown and Frank E. Schormachers at the end of this instrument?

A. They are.

Mr. Fayer: I re-offer this paper in evidence.

Mr. Mearns: Objected to as irrelevant, incompetent and immaterial and not examined, and acknowledged in accordance with the laws of this state and not binding upon the defendant.

Q. 20. Referring to Complainants' Exhibit No. 7, do you know whether the New York Finance Company defaulted in the payment of the sum of \$10,000 therein provided for, and also in the payment of certain interests therein for more than fifteen days after the same became due and payable?

A. Yes.

Q. 21. How do you know that fact?

Mr. Cawston: I object to that question as incompetent and immaterial.

A. I know it because I was a director in the corporation which made the note and after it was presented to the payee.

Complainants' Witness, Charles H. Burr, Direct

MR. CRUMMEY: I move to strike out the answer as incompetent and immaterial and not binding upon the defendant.

Q. 22. Did the New York Finance Company so default in the payment of the sum of \$10,000 therein provided for and also in the payment of certain interest thereon for more than fifteen days after the same became due and payable?

MR. CRUMMEY: Objected to as incompetent and immaterial and irrelevant and not binding on the defendant.

A. It did so default.

Q. 23. You represented Brown and Schermerhorn as attorney thereafter, did you, Mr. Burr?

MR. CRUMMEY: Objected to as leading.

Q. 24. I will withdraw the question. Do you know what steps Brown and Schermerhorn took, if any, to protect themselves under the collateral mentioned in the note?

A. Yes.

Q. 25. How do you know, Mr. Burr?

MR. CRUMMEY: I object to the question as incompetent, immaterial and irrelevant.

A. I know because I acted for the gentleman as counsel in the matter.

Q. 26. Will you state what steps you did take and what was done?

MR. CRUMMEY: Objected to as incompetent, immaterial and irrelevant and not binding on the defendant.

A. Acting under my advice the interests of Conrad Morris Braker assigned to the New York Finance Company by the assignments already in evidence were offered at public auction in the city of Philadelphia and

Complainants' Witness, Charles H. Burr, Cross

in my presence purchased by Mr. Wolff, who was the highest bidder at the sale.

Q. 27. Do you recall what day that sale took place?

A. May 3rd, 1911.

Q. 28. Do you recall at what amount the collateral was purchased for?

A. My recollection is \$2,000, but the document speaks for itself.

CROSS-EXAMINATION.

By MR. CRUMMEY:

XQ. 29. Mr. Burr, at the time of the alleged loan by the complainant in the New York Finance Company, that is on December 19, 1906, were you an officer of the New York Finance Company?

A. I was a director.

XQ. 30. Did you at that time represent John A. S. Brown and John E. Schermerhorn?

A. No.

XQ. 31. When were you first retained to represent them as attorney, in this matter?

A. About the time that this \$10,000 fund became payable to Mr. Braker.

XQ. 32. And that was July 21st, 1910?

A. Yes.

XQ. 33. Have you been acting as attorney for Brown and Schermerhorn since that date?

A. I have.

XQ. 34. On December 19, 1906, was there any other instrument executed by the New York Finance Company to Brown and Schermerhorn?

A. I don't think so.

XQ. 35. Do you recall the giving of a note by the New York Finance Company to Brown and Schermer-

Complainants' Witness, Charles H. Burr, Cross

horn on or about December 19, 1906, for \$3333, payable February 25, 1913?

A. I did not personally close that transaction, but I now remember there was such a note.

XQ. 36. Do you recall as one of the directors of the New York Finance Company voting in favor of the resolution on or about that date in favor of extending the time of payment of the note for \$10,000 dated December 19, 1906, in consideration of which the New York Finance Company was to deliver its note to Brown and Schermerhorn for \$3333?

A. I remember that there was an agreement with respect to the subject but I cannot recollect the positive details.

XQ. 37. But you remember voting for it?

A. No; I don't doubt I did.

XQ. 38. Was such a note issued and delivered to Brown and Schermerhorn?

A. An additional note was delivered.

XQ. 39. What was the consideration for that note?

A. This transaction.

XQ. 40. Under the resolution of the board wasn't that note to be issued in consideration and extension of the time for the payment of the \$10,000 note until February 25, 1913?

A. I do not remember the form of the transaction; I do remember there was such a transaction. I believe those to be correct copies of the minutes of the proceedings of the executive committee (looking at paper shown witness).

XQ. 41. Who were the executive committee on December 19, 1906, of the New York Finance Company?

A. It is mentioned in those papers, Arthur W. Depue, William H. Cochran and myself.

XQ. 42. At a meeting of the executive committee

Complainants' Witness, Charles H. Burr, Cross

held at No. 11 Broadway, New York City on December 19, 1906?

A. I believe those to be correct copies of the minutes. I do not otherwise recollect.

XQ. 43. Will you say you were present or not at a meeting held December 19, 1906?

A. I cannot answer other than to say that I believe those to be correct copies of the minutes, and that if so, I was present.

XQ. 44. Do you remember a resolution being passed in regard to the extension of the time for the payment of the \$10,000 note?

A. Yes.

XQ. 45. Do you remember a resolution being passed authorizing and directing the president of the New York Finance Company to make and procure an agreement for the extension of the loan of \$10,000 which you had reported to the meeting that you had secured?

A. Yes.

XQ. 46. And thereafter was an agreement made for the extension of the time for the payment of the \$10,000 note?

A. I do not recollect.

XQ. 47. Do you remember that the note for \$3333 was issued and delivered to Brown and Schermerhorn?

A. I do not.

XQ. 48. Was there an instrument executed by the New York Finance Company on December 19, 1906, assigning certain interests in the estate of Conrad Braker, Jr., to Brown and Schermerhorn as security for the payment of the note of the New York Finance Company for \$3333?

A. I think there was. (After looking at paper.)
Yes.

Complainants' Witness, Charles H. Burr, Cross

(It is admitted that the letter dated April 28, 1911, addressed to John A. S. Brown, Franklin Building, Philadelphia, Pennsylvania, from Stafford A. Crummey was received as set forth in the defendant's answer in full, was received by John A. S. Brown on or about its date, and that a letter dated June 13, 1911, to Stafford A. Crummey, Esq., 165 Broadway, New York City, from John A. S. Brown, was as set forth in full in defendant's answer was sent on or about its date by John A. S. Brown to Stafford A. Crummey.)

XQ. 50. When did you first see that letter of April 28, 1911, from Stafford A. Crummey to John A. S. Brown?

MR. FROST: I object to all the cross-examination which does not relate to the instruments which have been proven by Mr. Burr as improper cross-examination and not covered by the direct and move to strike it all out so far as it does not relate to the matters covered in the direct examination.

A. Shortly after its receipt.

XQ. 51. That is, within a few days afterwards?

MR. FROST: Same objection.

A. Comparatively soon after; I can't just recollect.

XQ. 52. Did you have knowledge at that time that an action had been commenced by Conrad Morris Braker against the New York Finance Company in the Supreme Court of the State of New York, New York County, to secure a judgment cancelling the assignments from Conrad Morris Braker to Frank L. Rabe dated June 13, 1901, and from Frank L. Rabe to New York Finance Company dated October 1st, 1901?

MR. FROST: Objected to as not proper cross-examination.

Complainants' Witness, Charles H. Burr, Cross

A. Yes.

XQ. 53. When did you first know that an action had been commenced against the New York Finance Company.

MR. FROST: Same objection.

A. Very soon after it had been begun.

XQ. 54. How often have you seen Conrad Morris Braker write?

A. Quite a few times.

XQ. 55. How often have you seen him in the last eleven years?

A. I should have to guess at it, and I should say ten times.

XQ. 56. When did you first see him after the year 901?

A. I believe it would be a safe statement to say in 1902.

XQ. 57. Have you ever seen him write in February, 1902?

A. I think so.

XQ. 58. When and where?

A. In my office in Philadelphia. I cannot say the exact time. I remember his coming over to confer with me.

XQ. 59. Since February, 1902?

A. I think so.

XQ. 60. Did you have occasion to write at that then in your presence?

A. I remember his sitting down in my library and making calculations and memoranda. The desk was in the centre of the room.

XQ. 61. Did he sign his name at that time, Mr. Burr?

A. I can't recollect.

Complainants' Witness, Charles H. Burr, Cross

XQ. 62. Was there any occasion since that time that you saw him write his name?

A. I remember meeting him in New York in Mr. Depue's office.

XQ. 63. When?

A. I should say around 1905.

XQ. 64. Was that the occasion of the payment of the money to the New York Finance Company?

A. Yes, also when he was trying to get money from the Penn Mutual Life Insurance Company.

XQ. 65. Did he have occasion to sign his name in your presence?

A. Yes.

XQ. 66. Did he do so?

A. Yes.

XQ. 67. Is that the only occasion that you recall of his signing his name in your presence?

A. Those times stand out in my memory. He has on various occasions written me letters, and talked with me, signed affidavits and other papers, and I cannot, after this lapse of time, more specifically answer than I have already done.

MR. CRUMMEY: I move to strike out the entire answer nunc pro tunc.

XQ. 68. You managed this whole deal with Brown and Schermerhorn, did you not, Mr. Burr?

A. I did not have the charge of it.

XQ. 69. Who negotiated the alleged loan with Brown and Schermerhorn?

A. I think I mentioned it to Mr. Brown and then the details were taken up with and arranged by Mr. Cochran, counsel for the company.

XQ. 70. Was there any broker in the transaction?

A. I do not think so.

Complainants' Witness, Charles H. Burr, Cross

XQ. 71. Where was the matter closed—at your office?

A. I think it was closed in New York, but I may be in error as to that.

XQ. 72. How was the money paid?

A. I think it was paid in two sums, \$5000 each.

XQ. 73. In what form?

A. Checks.

XQ. 74. Whose checks.

A. I haven't any recollection that Mr. Schermerhorn paid first and Mr. Brown came in later.

XQ. 85. Each paid half, \$5000 each?

A. Yes.

XQ. 86. Who got the money?

A. The New York Finance Company got the money.

XQ. 87. Where were the checks deposited?

MR. FROST: Objected to as not proper cross-examination and as immaterial, irrelevant and incompetent.

A. I do not remember.

XQ. 88. Well, you know whether they were deposited in New York or Philadelphia, don't you?

MR. FROST: Same objection.

A. I think they were deposited in Philadelphia.

XQ. 89. Isn't it a fact that they were deposited to your personal account in your bank at Philadelphia?

MR. FROST: Same objection, not proper cross-examination, because not covered by the direct.

A. My recollection is that the money was used to pay off certain existing loans and that I personally attended to this.

XQ. 90. Was the money deposited in your personal account?

MR. FROST: Same objection.

A. I do not recollect.

Complainants' Witness, Charles H. Burr, Cross

XQ. 91. At this time you are a member of the executive committee of the New York Finance Company, were you not?

A. Yes.

XQ. 92. Were you also a stockholder in the company?

A. Yes.

XQ. 93. You held a large block of stock, Mr. Burr, didn't you?

A. Yes.

XQ. 94. You and Mr. Depue owned nearly all the stock of the company, did you not?

MR. FROST: I object to that as not proper cross-examination and not covered by the direct.

A. About fifty odd per cent. together.

XQ. 95. Well, about this time you began to liquidate the affairs of the company, did you not?

MR. FROST: I object to that as not proper cross-examination and not covered by the direct and on the ground that it is incompetent, irrelevant and incompetent.

A. I should say not until 1908, or the end of 1907.

XQ. 96. And you began to liquidate the affairs of the company towards the end of 1907 or the beginning of 1908?

MR. FROST: Same objection.

A. Yes.

XQ. 97. This transaction with Brown and Schermerhorn was about your last transaction with the New York Finance Company, was it not?

MR. FROST: Objected to as not proper cross-examination and not covered by the direct and on the further ground that it is immaterial, irrelevant and incompetent.

A. There were only one or two more.

Complainants' Witness, Charles H. Burr, Cross

XQ. 98. Well, you were the counsel for the company, were you not, at this time?

A. No. They had their counsel in New York, Mr. Cochran.

XQ. 99. You acted as attorney for the New York Finance Company in the transaction with Brown and Schermerhorn?

A. I acted for the company in the matter, but the——

XQ. 100. Either as attorney or as a member of the executive committee?

A. (Continued.) When there were any legal questions in the matter were passed on by Mr. Cochran.

XQ. 101. Well, did you act for the company in this transaction?

A. Yes, with this proviso.

XQ. 102. And as a large stockholder you had a personal interest in seeing what disposition was made of this \$10,000 borrowed, did you not?

MR. FROST: I object to that as immaterial, irrelevant and incompetent.

A. I don't quite understand the question.

XQ. 103. I asked you—you have testified that you cannot recall what, whether the \$10,000 was deposited in your personal account. Now, I ask you whether, as the largest stockholder, you didn't have a personal interest in seeing what disposition was made of that money, and who got it?

A. I know it was used for the company's purposes, but I think a large portion of it was used in paying off the indebtedness of the company.

XQ. 104. You don't recall in what way that was done?

A. Doubtless I did it myself. I do not recollect what particular bank that money was put in, and what

Complainants' Witness, Charles H. Burr, Cross

particular checks drawn against the fund were drawn for.

XQ. 105. But you know it was used to pay some obligation of the company? The company had no bank account at that time, had it?

MR. FROST: I object to that as improper cross-examination and as immaterial, irrelevant.

A. The funds were handled by Mr. Depue in New York or by myself in Philadelphia. They had no account in their bank at that time.

XQ. 106. As this was a Philadelphia transaction the probability is that the money was deposited in your account, was it not?

MR. FROST: I object to that as improper in form and improper cross-examination not called by the direct and on the further ground that it is immaterial and irrelevant.

A. I am almost certain that it was.

XQ. 107. And you used your personal account for collecting the funds of the company and disbursing them, is that right?

MR. FROST: Same objection.

A. My personal account or my attorney's account.

XQ. 108. How long have you known Mr. Brown personally?

A. Thirteen years, I should say.

XQ. 109. Did you ever have any other business transaction with him other than this, I mean of this nature?

MR. FROST: I object to that as improper cross-examination and not covered by the direct and as immaterial and incompetent.

A. We had one other transaction, possibly similar, in New York, not with the New York Finance Company, nor with me.

Complainants' Witness, Charles H. Burr, Cross

XQ. 110. When was this transaction you speak of?

A. Shortly after this one with Brown and Schermerhorn.

XQ. 111. How long have you known Mr. Schermerhorn?

A. About twenty years.

XQ. 112. Have you ever acted as attorney for Mr. Brown or Mr. Schermerhorn before July 21, 1910?

A. Not for Mr. Brown, and I think not for Mr. Schermerhorn personally.

XQ. 113. He was trustee of the Thomas Cunningham estate, was he not?

A. Yes.

XQ. 114. Didn't you prove the Thomas Cunningham will?

A. No.

XQ. 115. How long have you been acting as attorney for Mr. Schermerhorn as trustee under the will of Thomas Cunningham?

A. I cannot recollect at the moment any other matter in which as trustee of the Cunningham estate I have represented him.

XQ. 116. Well, how long have you been acting for him in any capacity, personally or as trustee or executor?

A. I would find it very hard without my books to answer that question.

XQ. 117. Well, let me put it this way: Did you ever act as attorney for Mr. Schermerhorn individually or representative of any estate prior to December, 1908?

MR. FROST: I object to that on the same ground as stated before.

A. I am fairly confident I did not.

Complainant's Witness, Charles H. Burr, Cross

XQ. 118. Did you act as attorney for the company of which he is treasurer or any officers?

A. I think I first acted for that company in 1906 and not before.

XQ. 119. You are confident you only had two transactions with Mr. Brown of this nature?

A. This transaction and one other transaction not with the New York Finance Company, which he spoke to me about and in which I refused to advise him, because I thought it a matter peculiarly for New York counsel.

XQ. 120. Can you fix the time of this last transaction?

Mr. Fawcett: I object to that for the same reasons as stated.

A. About 1907 I think. The other transaction was November 23, 1906.

XQ. 121. And you then acted for him in an advisory capacity?

A. I have already answered that I did not.

XQ. 122. Well, did he then consult you?

A. No, he consulted New York counsel.

XQ. 123. And you refused to advise him?

A. Yes.

XQ. 124. He came to you and wanted you to take up the matter, didn't he?

A. I don't remember how it happened; I simply remember that I was spoken to about the matter and declined to give an opinion.

XQ. 125. Did he come to your office?

Mr. Fawcett: I object to this for the same reasons as stated before.

A. I recollect nothing more than that he and Mr. Schermerhorn were conversed in this office because

Congressman's' Witness, Charles E. Davis, Clerk

Can that they spoke to me about, and that we mutually agreed to be guided by advice of New York counsel.

Q. 126. Did they both come to your office at that time?

A. From: I object to this as improper cross-examination, as immaterial, irrelevant and incompetent and advise the witness not to answer.

A. My answer is I don't recollect.

Q. 127. Well, do you recall whether either of them had occasion to write their names at that time when they came to your office?

A. No.

Q. 128. Well, did they write their names at any time on December 11, 1904?

A. I do not recollect.

Q. 129. And are there the only two occasions on which you had an opportunity to be in their presence?

A. I have known both of them for many many years. I saw them sign the bill in this case in my office.

Q. 130. Who arranged the sale of this interest in the estate of Austin?

A. It was done by my advice entirely.

Q. 131. And who is Charles J. Wolff?

A. The individual procured by Brown and Shuman. I do not know him.

Q. 132. They arranged to have him present and bid at the sale?

A. I do not know that he was present at the sale.

Q. 133. Did they arrange to have Wolff attend at the sale and bid at the sale?

A. I do not know. What was then was that Mr. Wolff was a ~~strong~~ man to take the title from them at the sale, that he was also bid and they conveyed land to him.

Complainants' Witness, Charles H. Burr, Cross

XQ. 134. Were they any other bidders there?

A. I think not.

XQ. 135. And was the sale publicly advertised?

A. Yes.

XQ. 136. Did Wolff give his check for \$2000 to Brown and Schermerhorn?

A. I do not think so.

XQ. 137. There was no consideration passed at all, was there?

A. I do not think so.

XQ. 138. That is the sum of \$2000 mentioned in the assignment might just as well have been one dollar?

A. I should not agree with you—

XQ. 139. So far as the actual consideration?

A. I have tried to tell you that the man was a straw man.

XQ. 140. Are you, Mr. Burr, the Charles H. Burr who testified before Judge O'Gorman in the case of Julius G. Westlar, plaintiff against New York Finance Company in an action in the Supreme Court of the State of New York, New York County, on January 28, 1910?

MR. FROST: Objected to as not proper cross-examination, not covered by the direct, also on the ground that it is immaterial, irrelevant and incompetent.

A. I answer that yes.

XQ. 141. Is your associate on the executive committee of the New York Finance Company at the meeting of the committee held on or about December 19, 1906, namely Mr. Arthur W. Depue, the same Arthur W. Depue who testified in the Westlar case?

MR. FROST: Same objection.

A. Yes.

(Cross-examination closed.)

Complainants' Witness, Geo. Koppenhoefer, Jr., Direct

RE-DIRECT EXAMINATION.

By MR. FROST:

RDQ. 142. In the resolution which was passed extending the time to pay this note, was there any waiver of the prompt payment of interest?

A. No.

(Examination closed.)

GEORGE KOPPENHOEFER, JR., called as a witness on behalf of the complainant, being first duly sworn, testified as follows in answer to interrogatories propounded by Mr. Frost:

Q. 1. Where do you live?

A. Philadelphia.

Q. 2. Are you a notary public for the county of Philadelphia?

A. I am.

Q. 3. I show you Complainants' Exhibit 7 and ask you if your name is signed as a witness to the execution of that paper by Charles D. Wolff?

A. That is my signature; yes, sir.

Q. 4. Was that paper, signed, sealed and delivered in your presence?

A. It was.

Q. 5. Did you take the acknowledgement of Charles D. Wolff to that instrument?

MR. CRUMMEY objected to that question as leading and calling for a conclusion.

A. I did take that acknowledgment.

Q. 6. Now, what happened?

A. Well, this paper was signed as I before stated by Mr. Wolff in my presence and acknowledged by Mr. Wolff in my presence—

Complainants' Witness, Geo. Koppenhoefer, Jr., Cross

MR. CRUMMEY: I move to strike out "acknowledged by Mr. Wolff" as a conclusion.

A. (Continued.)—on the sixth day of May, 1911.

Q. 7. He was known to you to be Charles D. Wolff, was he not?

A. Yes, sir. I might state that on that same day I had filled up another paper signed by Mr. Wolff.

MR. CRUMMEY: I move to strike out all after the word "yes."

Q. 9. He acknowledged to you in due form of law that he executed the instrument as and for his voluntary act and deed, did he not?

MR. CRUMMEY: I object to the question as leading and calling for a conclusion.

A. He did.

Q. 10. And you signed your name and affixed your notarial seal on that day, did you not?

A. I did; yes, sir.

Q. 11. Is that the signature of Charles D. Wolff?

A. Yes, sir; it is.

MR. FROST: I re-offer this paper in evidence.

CROSS-EXAMINATION.

By MR. CRUMMEY:

XQ. 12. How long have you known Mr. Wolff?

A. I can't say that I knew him prior to that time.

XQ. 13. How do you know that the man who signed that document was Charles D. Wolff?

A. As I said before Mr. Wolff executed a paper in my presence that very same day. He was introduced to me and identified to my satisfaction that he was the man that signed that paper.

XQ. 14. Who introduced him, some one you knew personally?

Complainants' Witness, Geo. Koppenhoefer, Jr., Cross

A. Frank E. Schermerhorn introduced him to me that day.

XQ. 15. Had you known Mr. Schermerhorn some time before?

A. Yes, for years.

MR. CRUMMEY: Objected to as incompetent, irrelevant and immaterial and not executed and acknowledged in accordance with the laws of the State of New York, and not binding on the defendant.

(Complainants' testimony closed.)

Certificate of Standing Examiner

CERTIFICATE OF STANDING EXAMINER.

DISTRICT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

<i>John A. S. Brown and Frank E.</i>	}
<i>Schermerhorn, as Trustee, &c.,</i>	
Complainants,	
against	
<i>Austin B. Fletcher, as Testamentary</i>	}
<i>Trustee, &c.,</i>	
Defendant.	

I, William Parkin, a standing examiner, of the United States District Court for the Southern District of New York, do hereby certify that the foregoing testimony in the above-entitled cause was taken by me at the times and places in the record therein indicated, and I was attended by Mr. Charles H. Burr and Mr. Fredric W. Frost for complainant, and Mr. William P. S. Melvin and Mr. S. A. Crummey, for defendant, before testifying each of the several witnesses was by me duly sworn to tell the truth, the whole truth and nothing but the truth. That their testimony was by consent of counsel taken down upon a typewriter and their signatures to their testimony were waived. I further certify that I am not the attorney nor of counsel for any of the parties in the cause, nor interested in the event thereof.

WM. PARKIN,
Examiner.

June 27th, 1912.

Stipulation

STIPULATION.

New York, August 15, 1912,

10 A. M.

Met pursuant to adjournment.

Appearances: MONROE BUCKLEY, Esq., representing
Charles H. Burr, Esq., for the plain-
tiff;

WILLIAM P. S. MELVIN, Esq., attorney for
the defendant.

It is stipulated and agreed by and between counsel for the respective parties in this action, that the documents offered in evidence by Mr. Melvin at the previous meeting for the taking of testimony in the case on August 5, 1912, may be marked as to their numbers by the examiner at some date to be agreed upon by counsel upon his return from Europe, provided said return takes place before the next term of the court, subject to all the objections heretofore made by counsel for the complainant to the relevancy, materiality and competency thereof, &c. And upon the further understanding that the defendant has completed the taking of testimony on his behalf in this case.

The complainant hereby renews each and every objection heretofore made to the evidence and documents presented by the defendant.

*Complainants' Exhibit No. 1***COMPLAINANTS' EXHIBIT NO. 1.**

Complainants' Exhibit No. 1, being an Assignment, Conrad Morris Braker to Frank L. Rabe, dated June 13, 1901, is Exhibit "B" attached to the Bill of Complaint at page 26, *supra*, with the following additions, to wit:

Recorded in the office of the Register of the County of New York in Liber 4 of Miscellaneous Instruments, page 125, on the 28 day of June, A. D. 1901, at 2 o'clock 50 Mins. P. M.

Witness my hand and official seal.

ISAAC FROMME,
(Seal) *Register.*

Recorded in the office of the Surrogates of the County of New York, in liber 3, of Conveyances and Mortgages of interests in decedents' estates, page 190, on the 21 day of Dec., A. D. 1906, at 3 o'clock 55 min. P. M.

Witness my hand and seal of the court.

DANIEL J. DOWDNEY,
(Seal) *Clerk of the Surrogates' Court.*

(Indorsed: "L 3 Assign. P. 190, Conrad Braker, Jr. Conrad M. Braker to Frank L. Rabe, Assignment Dated June 13th, 1901, New York Finance Co., 11 Broadway, New York. Record examined by E. & H. Date Jany. 19. Filed Dec. 21, 1906. Surrogates Court, N. Y. County, 3.55 P. M. U. S. District Court. Filed July 1, 1912. M., S. D. of N. Y. E-7-231, U. S. District Ct.: Southern District of N. Y. Brown & ano. vs. Fletcher, Trustee, Complainants' Ex. 1, June 26, 1912. Wm. Parkin, Examiner.")

Complainants' Exhibit No. 2

COMPLAINANTS' EXHIBIT NO. 2.

Complainants' Exhibit No. 2, being an assignment, Conrad Morris Braker to Frank L. Rabe, dated April 18, 1901, is Exhibit "C," attached to the Bill of Complaint at page 31, *supra*, with the following additions, to wit:

Recorded in the office of the Register of the County of New York in liber 4 of Miscellaneous Instruments, page 74, on the 27th day of April, A. D. 1901, at 11 o'clock 42 min. A. M.

Witness my hand and official seal.

ISAAC FROMME,
(Seal) *Register.*

This certifies that the foregoing acknowledgment was recorded with the instrument of record in Liber 4 Page 74.

ISAAC FROMME,
Register.

Recorded in the office of the Surrogates' of the County of New York in liber 3, of Conveyances and Mortgages of interests in decedents' estates, page 195, on the 21 day of Dec., A. D. 1906, at 3 o'clock 50 min. P. M.

Witness my hand and seal of the court.

DANIEL J. DOWDNEY,
(Seal) *Clerk of the Surrogates' Court.*

Complainants' Exhibit No. 3

(Indorsed: "Apr. 27, 1901. Conrad M. Braker to Frank L. Rabe. Assignment. Record with Miscellaneous Papers. Examined G. F. B. Indexed E. J. F. Record and ret. to Cochran, Moore & Hildreth, Counsellors at law, 45 Broadway, Manhattan Borough, New York City. L. 3, Assgn. P. 195, Conrad M. Braker to Frank L. Rabe. (1) Assignment dated April 18, 1901. Record examined by E. & H. Date Jany. 9, 1907. New York Finance Co., 11 Broadway, New York. Filed Dec. 21, 1906, Surrogates' Court, N. Y. County, 3.50 P. M. U. S. District Court, Filed July 1, 1912, S. D. of N. Y. E. 7-231. U. S. District Court, Southern District of N. Y. Brown & ano. vs. Fletcher, Trustee. Complainants' Exhibit 2. June 26, 1912. Wm. Parkin, Examiner.")

COMPLAINANTS' EXHIBIT NO. 3.

Complainants' Exhibit No. 3, being a promissory note, New York Finance Company to John A. S. Brown and Frank E. Schermerhorn, as Trustee, etc., dated December 19, 1906, is Exhibit "F," attached to the Bill of Complaint at page 42, *supra*, with the following additions, to wit:

(Indorsed: "New York Finance Company to John A. S. Brown and Frank E. Schermerhorn. Collateral Note, December 17, 1906, \$10,000. William H. Cochran, Attorney, 11 Broadway, New York. U. S. District Court, Filed July 1, 1912. M., S. D. of N. Y. E. 7-231. U. S. District Court, Southern District of N. Y. Brown & ano. vs. Fletcher, Trustee, Complts.' Exhibit 3. June 26, 1912. Wm. Parkin, Examiner.")

Complainants' Exhibit No. 4

COMPLAINANTS' EXHIBIT NO. 4.

Complainants' Exhibit No. 4, being an assignment, Frank L. Rabe to New York Finance Company, dated October 1, 1901, is Exhibit "D," attached to the Bill of Complaint at page 36, *supra*, with the following additions, to wit:

Acknowledgment (Notary).

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.:

I, Thomas K. Finletter, prothonotary of the County of Philadelphia, and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do by my deputy, James W. Fletcher, authorized by Act of Assembly of May 26th, 1897, certify that Francis S. Ginther, Esquire, whose name is subscribed to the certificate of the acknowledgment of the annexed instrument and thereon written, was at the time of such acknowledgment a Notary Public for the Commonwealth of Pennsylvania, residing in the County aforesaid, duly commissioned and qualified to administer oaths and affirmations, and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and I further certify that the said Instrument is executed and acknowledged

Complainants' Exhibit No. 4

in conformity with the laws of the State of Pennsylvania.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court this 21st day of December, in the year of our Lord, One thousand nine hundred and six (1906).

THOMAS K. FINLETTER,
(Seal) *Prothonotary.*

By JAS. W. FLETCHER,
Dep. Prothonotary.
durante absentia, secundum legem.

Recorded in the office of the Surrogates' of the County of New York in liber 3, of Conveyances and Mortgages of interests in decedents' estates, page 200 on the 21 day of December, A. D. 1906, at 3 o'clock 56 min. P. M.

Witness my hand and seal of the court.

DANIEL J. DOWDNEY,
(Seal) *Clerk of the Surrogates' Court.*

(Indorsed: "[Braker Int.) Assignment and Power of Attorney Frank L. Rabe to New York Finance Co.] [L. 3 Assgn. P. 200. Conrad Braker, Jr. Frank L. Rabe to New York Finance Company. Assignment dated October 1st, 1901. Filed Dec. 21, 1906, Surrogates' Court, N. Y. County, 3.56 P. M. New York Finance Co., 11 Broadway, New York, Record Examined by E. & H. Date Jany. 9, 1907, U. S. District Court. Filed Jul. 1, 1912, M., S. D. of N. Y. E. 7-231, Brown & ano. vs. Fletcher, trustee, Complainants' Ex. 4, June 26, 1912, Wm. Parkin, Examiner.")

Complainants' Exhibit No. 5

COMPLAINANTS' EXHIBIT NO. 5.

Complainants' Exhibit No. 5, being an assignment Frank L. Rabe to New York Finance Company, dated January 4, 1907, is Exhibit "E," attached to the Bill of Complaint at page 38, *supra*, with the following additions, to wit:

Acknowledgment (Notary).

STATE OF PENNSYLVANIA, }
 COUNTY OF PHILADELPHIA, } ss.:

I, Thomas K. Finletter, prothonotary of the County of Philadelphia, and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do by my deputy, James W. Fletcher, authorized by Act of Assembly of May 26th, 1897, certify that Grace C. Fisher, Esquire, whose name is subscribed to the certificate of the acknowledgment of the annexed instrument and thereon written, was at the time of such acknowledgment a Notary Public for the Commonwealth of Pennsylvania, residing in the County aforesaid, duly commissioned and qualified to administer oaths and affirmations, and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and I further certify that the said Instrument is executed and acknowledged

Congratulations' Exhibit No. 3

in conformity with the laws of the State of Pennsylvania.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court this 11th day of January, in the year of our Lord, One thousand nine hundred and seven (1907).

THOMAS E. FOLETT,
(Seal) *Prothonotary.*

By Jas. W. FOLETT,
Dep. Prothonotary.
Subscribes abovesaid, according to law.

Recorded in the office of the Surrogate of the County of New York in Book 3 of Conveyances and Mortgages of interests in Real Estate, page 226, on the 14 day of January, A. D. 1907, at 2 o'clock 11 min. P. M.

Witness my hand and seal of the court.

DANIEL J. DOWNEY,
(Seal) *Clerk of the Surrogate's Court.*

(Inclosed: "L. S. Assign. P. 226, Estate of Carroll Decker, Jr. Frank L. Rule to New York Finance Company, Assignment dated January 4, 1907, New York Finance Co., 11 Broadway, New York. Filed Jan. 14, 1907, Surrogate's Court, N. Y. County, 230 P. M. Record examined by D. & H. Jan. 14, 1907. U. S. District Court, July 1, 1902. M., S. D. of N. Y. 15-228, U. S. District Ct., Southern District of N. Y. Decker & one vs. Fletcher, Trustee, Congratulations' Ex. 3, June 20, 1902. Wm. Fletcher, Examiner.")

Completions' Exhibit No. 2

COMPLETION'S EXHIBIT NO. 2.

Completions' Exhibit No. 2, being an assignment, John S. G. Brown, and Frank S. Schwaninger, as Trustee, etc., to Charles S. Wolf, dated May 2, 1911, is Exhibit "B," attached to the Bill of Complaint at page 21, supra, with the following additions to wit:

Subscribed and sworn to before me

1911

Given at Pennsylvania, $\frac{1}{2}$
 Given at Pennsylvania, $\frac{1}{2}$ at:

I, Henry S. Vinton, Notary Public of the County of Philadelphia, and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify that George Hays, publisher, Dr., Register, whose name is subscribed to the certificate of the acknowledgment of the several instrument and license within, was at the time of said acknowledgment a Native Phila for the Commonwealth of Pennsylvania residing in the County aforesaid, fully commissioned and qualified to receive oaths and affirmations, and to take acknowledgments and proofs of facts of Pennsylvania for such, contracts and acknowledgments to be recorded in said State of Pennsylvania, and to all others with an equal faith and credit as and ought to be given as set forth in Courts of Judgments or Jurisdiction; and that I am well acquainted with the handwriting of the said George Hays and verify before the aforesaid Clerk of Court as given, and I further certify that the said George

Complainants' Exhibit No. 6

ment is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court this 6th day of May, in the year of our Lord, One thousand nine hundred and eleven (1911).

HENRY F. WALTON,

(Seal)

Prothonotary.

Recorded in the office of the Surrogates' of the County of New York in liber 10 of Conveyances and Mortgages of interests in decedents' estates, page 27, on the 6 day of June, A. D. 1911, at 12 o'clock 52 min. P. M.

Witness my hand and seal of the court.

DANIEL J. DOWDNEY,

(Seal) *Clerk of the Surrogates' Court.*

(Indorsed: "Estate of Conrad Braker, Jr., deceased. John A. S. Brown and Frank E. Schermerhorn to Charles Z. Wolff. Assignment. Surrogates' Court, County of New York. Received June 6, 1911. U. S. District Court. Filed July 1, 1912. M., S. D. of N. Y. U. S. District Ct. Southern District of N. Y. E. 7-231. Brown vs. Fletcher, as Trustee, Complainants' Exhibit 6, June 26, 1912. Wm. Parkin, Examiner.")

Complainants' Exhibit No. 7

COMPLAINANTS' EXHIBIT NO. 7.

Complainants' Exhibit No. 7, being an assignment, Charles Z. Wolff to John A. S. Brown and Frank E. Schermerhorn, at Trustee, etc., dated May 6, 1911, is Exhibit "I," attached to the Bill of Complaint at page 52, *supra*, with the following additions, to wit:

Acknowledgment (Notary).

1303.

STATE OF PENNSYLVANIA, }
 COUNTY OF PHILADELPHIA, } ss.:

I, Henry F. Walton, Prothonotary of the County of Philadelphia, and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify that George Koppenhoefer, Jr., Esquire, whose name is subscribed to the certificate of the acknowledgment of the annexed instrument and thereon written, was at the time of such acknowledgment a Notary Public for the Commonwealth of Pennsylvania residing in the County aforesaid, duly commissioned and qualified to administer oaths and affirmations, and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and I further certify that the said Instrument is executed and acknowledged in conformity with the laws of the State of Pennsylvania.

Complainants' Exhibit No. 7

In Testimony whereof I have hereunto set my hand and affixed the seal of said court this 6th day of May, in the year of our Lord, One thousand nine hundred and eleven (1911).

HENRY F. WALTON,
(Seal) *Prothonotary.*

Recorded in the office of the Surrogates' of the County of New York in liber 10 of Conveyances and Mortgages of interests in decedents' estates, page 2, on the 6 day of June, A. D. 1911, at 12 o'clock 52 min. P. M.

Witness my hand and seal of the court.

DANIEL J. DOWDNEY,
(Seal) *Clerk of the Surrogates' Court.*

(Indorsed: "Estate of Conrad Braker, Jr., deceased. Charles Z. Wolff to John A. S. Brown and Frank E. Schermerhorn. Assignment. Surrogates' Court, County of New York. Received June 6, 1911, U. S. District Court. Filed Jul. 1, 1912. M., S. D. of N. Y. U. S. District Court, Southern District of N. Y. E. 7-231. Brown & ano. vs. Fletcher, Trustee, Complainants' Ex. 7, June 26, 1912. Wm. Parkin, Examiner.")

Complainants' Exhibit No. 8

COMPLAINANTS' EXHIBIT NO. 8.

Complainants' Exhibit No. 8, being an assignment, New York Finance Company to John A. S. Brown and Frank E. Schermerhorn, as Trustee, etc., dated December 19, 1906, is Exhibit "G," attached to the Bill of Complaint at page 43, *supra*, with the following additions, to wit:

Recorded the preceding at the request of William H. Cochran, December 21st, 1906, at Three o'clock and fifty-seven minutes P. M.

DANIEL J. DOWDNEY,
(Seal) *Clerk of the Surrogates' Court,*
New York County.

(Indorsed: "Copy, New York Finance Company to John A. S. Brown and Frank E. Schermerhorn, Assignment, December 19, 1906, \$10,000. Filed 12/21/06. Surrogates' Court Libr. 3, p. 204. William H. Cochran, Attorney, 11 Broadway, New York. U. S. District Court, Filed Jul. 1, 1912. M., S. D. of N. Y. U. S. District Court, Southern District of N. Y. Brown vs. Fletcher, as Trustee. Compls.' Ex. 8, June 26, 1912. Wm. Parkin, Examiner.")

Defendant's Evidence and Exhibits

DEFENDANT'S EVIDENCE AND EXHIBITS.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schermerhorn, as Trustee for
Clara Schermerhorn, under the
Last Will and Testament of
Thomas Cunningham, deceased,
and a Citizen of the State of
Pennsylvania,*

versus

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
under the Last Will and Testament
of Conrad Braker, Jr., deceased,
and a citizen of the State of New
York.*

Sess. 1911.
No.

In Equity.

New York, August 15th, 1912.
11 a. m.

Office of William Parkin, Esq., Examiner.

Testimony on the part of the defendant.

Appearances: CHARLES H. BURR, ESQ., of Counsel for
the Complainants;

WILLIAM P. S. MELVIN, ESQ., Attorney
for the Defendant.

Attorney for the defendant offers in evidence
the judgment roll in the cause of Conrad Morris
Braker, against New York Finance Company,

Defendant's Evidence and Exhibits

Frank L. Rabe and Austin B. Fletcher, as Testamentary Trustee for the said Conrad Morris Braker, under the last Will and Testament of Conrad Braker, Jr., in the Supreme Court of the State of New York, New York County, filed February 5th, 1912, in the office of the Clerk of the County of New York, and produced from his files; the following are the papers offered, included in said roll:

Summons dated January 27, 1911; the complaint verified February 1st, 1911, Answer on the part of New York Finance Company, verified February 21, 1911, and exhibits attached, the Answer on the part of Austin B. Fletcher; decision of the Court dated January 31, 1911, by Samuel Greenbaum, Justice of the Supreme Court; Findings of Fact of Law as to the defendant Austin B. Fletcher, made by the same justice, same date and Judgment of the Court made February 5th, 1912, and the Request to Find on the part of the New York Finance Company, dated January 31, 1911, and the Findings of the Justice thereon.

IT IS ADMITTED on the part of counsel for the complainants that the foregoing papers are of record in the Clerk's Office of the County of New York, and are produced from those records, and marked "Defendant's Exhibits A to H."

IT IS STIPULATED that the printed copy of the foregoing documents may be made part of this record with the same force and effect as the original documents, subject only to objections of counsel for complainants as to their relevancy.

IT IS FURTHER STIPULATED that if there be any other documents in the judgment record which counsel for complainants may hereafter desire in-

Defendant's Evidence and Exhibits

cluded, the same may be produced by him in rebuttal and included in this record.

Counsel for complainants objects to the introduction in evidence of the aforesaid documents and the aforesaid judgment roll on the ground that complainants in this action were not parties to the action in the Supreme Court, from which the judgment roll is produced and that the said documents and said judgment roll are incompetent, irrelevant and immaterial so far as these complainants are concerned.

Attorney for the defendant offers in evidence certified copy of the order of the Appellate Division of the Supreme Court for the First Judicial Department, dismissing the appeal as against Austin B. Fletcher, taken in the action of Conrad M. Braker against New York Finance Co., Frank L. Rabe and Austin B. Fletcher, as Testamentary Trustee, for Conrad Morris Braker, under the last Will and Testament of Conrad Braker, Jr., in which the judgment was entered February 5th, 1912. The certified copy of the order made June 7th, 1912.

Counsel for complainant objects to the document called "Dismissal of Appeal as to Austin B. Fletcher" being introduced in evidence on the ground, first, that the same is not exemplified in accordance with the Act of Congress; second, that the same is incomplete, because not accompanied by the papers showing the reasons upon which such order was entered; third, because such document was entered in a suit to which complainants were not parties and are incompetent, irrelevant and immaterial so far as complainants are concerned. Counsel for complainants further objects

Defendant's Evidence and Exhibits

to all the documents, including the judgment roll, heretofor introduced, on the ground that insofar as they purport or attempt to bind these complainants they constitute an act of the State of New York depriving complainants of property without due process of law, contrary to the Fourteenth Amendment of the Constitution of the United States.

IT IS ADMITTED that the instrument marked "Exhibit I," is a copy of the document offered in evidence as a certified copy of the order dismissing the appeal as to Austin B. Fletcher.

Attorney for the defendant offers in evidence a copy of a letter of Safford A. Crummey to John A. S. Brown, one of the complainants, dated April 28th, 1911, and marked "Defendant's Exhibit J."

Counsel for complainants makes no objection to the fact that the letter is a copy.

Counsel for defendant also offers in evidence a letter in answer on the part of John A. S. Brown, dated June 13, 1911, to Safford A. Crummey, marked "Defendant's Exhibit K."

Counsel for defendants offers in evidence certified copies of papers in the Surrogates' Court of the County of New York, in the matter of the accounting of Austin B. Fletcher, as Testamentary Trustee for Conrad Morris Braker, under the last Will and Testament of Conrad Braker, Jr., deceased, namely, the petition of Austin B. Fletcher, dated and verified March 15th, 1912, the account of Austin B. Fletcher, and the verification thereof, verified March 15th, 1912, the citation issued out of the Surrogates' Court on said petition, March 16th, 1912, returnable May 14th, 1912, the affidavit of William P. S. Melvin, verified March 20th, 1912;

Defendant's Evidence and Exhibits

order of the Surrogates' Court as to publication of the citation made March 21st, 1912; the affidavit of Edwin F. Crane, verified April 19th, 1912; the affidavit of Safford A. Crummey, verified April 16th, 1912; the answer of Conrad Morris Braker, verified May 11th, 1912; the answer of Charles Z. Wolff, in the same proceeding, verified May 13th, 1912, and the answer of New York Finance Company, also verified May 13th, 1912, and the decree of the said Surrogates' Court, made August 2nd, 1912. Marked "Defendant's Exhibits L to V."

Counsel for complainants objects to the introduction of these documents on the ground, first, that they are not exemplified in accordance with the Act of Congress; second, that they do not purport to be a complete and true copy of all the proceedings had in the Surrogates' Court and in the District Court of the United States to which said proceedings were removed; third, that they are irrelevant because they seek to introduce evidence of matters and things occurring since the date of the filing of the Bill in Equity in this cause.

IT IS HEREBY STIPULATED that the copies of the proceedings in the Surrogates' Court offered in evidence may be used by the Special Master in place thereof.

The meeting is adjourned until Wednesday, August 15, 1912, at 10 o'clock A. M. and that the time for the defendant to take testimony be extended to cover that date or such further adjournment as counsel for the complainant shall agree.

Certificate of Standing Examiner

CERTIFICATE OF STANDING EXAMINER.

DISTRICT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

<i>John A. S. Brown and Frank E. Schmerhorn, as Trustee, &c., Complainants,</i>	}	In Equity.
against		
<i>Austin B. Fletcher, as Testamen- tary Trustee, &c., Defendant.</i>		

I, William Parkin, a Standing Examiner of the U. S. District Court for the Southern District of New York, do hereby certify that the foregoing testimony in the above entitled cause was taken by me at the times and places in the record therein indicated, and I was attended by Mr. Charles H. Burr and Mr. Frederick W. Frost on behalf of the complainants, and by Mr. William P. S. Melvin on behalf of the defendant. I further certify that I am not the attorney nor of counsel for any of the parties in the cause, nor interested in the event thereof.

WM. PARKIN,
Examiner.

October 8, 1912.

Defendant's Exhibit A

DEFENDANT'S EXHIBIT A.

SUMMONS.

SUPREME COURT, NEW YORK COUNTY.

Conrad Morris Braker,
Plaintiff,
against

*New York Finance Company, Frank L.
Rabe and Austin B. Fletcher, as
Testamentary Trustee for the said
Conrad Morris Braker, under the
Last Will and Testament of Conrad
Braker, Jr.,*

Defendants.

To the above named defendants:

YOU ARE HEAREBY SUMMONED to answer the complaint in this action, and to serve a copy of your answer on the Plaintiff's Attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated New York City, January 27, 1911.

SAFFORD A. CRUMMEY,

Plaintiff's Attorney,

Office & Post Office Address,

165 Broadway,

Borough of Manhattan,

New York City.

Defendant's Exhibits B and C

DEFENDANT'S EXHIBIT B.

Defendant's Exhibit B (being Complaint in the matter of Conrad Morris Braker against New York Finance Company, Frank L. Rabe and Austin B. Fletcher, as Testamentary Trustee for the said Conrad Morris Braker under the last will and testament of Conrad Braker, Jr., in the Supreme Court, New York County) is Exhibit "A" attached to defendant's answer at page 110, *supra*, with the following additions, to wit: Exhibit "B." Wm. Parkin, Examiner.

DEFENDANT'S EXHIBIT C.

Defendant's Exhibit C (being Answer of Defendant, New York Finance Company in the matter of Conrad Morris Braker against New York Finance Company, Frank L. Rabe and Austin B. Fletcher as Testamentary Trustee for the said Conrad Morris Braker under the last will and testament of Conrad Braker, Jr., in the Supreme Court, New York County) is Exhibit "B" attached to defendant's Answer at page 116, *supra*, with the following additions, to wit:

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.:

I, Henry F. Walton, Prothonotary of the County of Philadelphia, and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify that George Koppenhoefer, Jr., Esquire, whose name is subscribed to the certificate of the acknowledgment of the annexed in-

Defendant's Exhibit C

instrument and German edition, was at the time of such acknowledgment a Notary Public for the Commonwealth of Pennsylvania residing in the County aforesaid, duly commissioned and qualified to administer oaths and affirmations, and to take acknowledgments and proofs of deeds or Conveyances for lands, tenements and hereditaments to be recorded in said State of Pennsylvania, and to all whom oaths or such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and I further certify that the said instrument is recorded and acknowledged in conformity with the laws of the State of Pennsylvania.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said court this 21st day of February, in the year of our Lord, One thousand nine hundred and eleven (1911).

ERNEST F. WALTON,

(Seal)

Prothonotary.

On the above-mentioned day of October, A. D. 1901, before me, the undersigned, a Notary Public for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared the within-named Frank L. Rabe, and in the form of her acknowledged the above written assignment and power of attorney to be his act and deed and desired the same might be recorded as such. Witness my hand and Notarial Seal the day and year aforesaid.

FRANCIS S. GENTHER,

Notary Public.

Commission expires January 30, 1903.

Appendix 1: Exhibit 1

The Exhibit "1" (a) (i) records was obtained a copy of assignment, General Motors Station in French L. State, March 1900 (10, 1900), and obtained in the list of Complaint records, as Exhibit "1" (a) (i) is also list, at page 10, supra.

The Exhibit "1" (b) (i) records was obtained a copy of assignment, French L. State in New York American Company, March 1900 (10, 1900), and obtained in the list of Complaint records, as Exhibit "1" (b) (i) is also list, at page 10, supra.

Defendant's Exhibit D

DEFENDANT'S EXHIBIT D.

SUPREME COURT,
NEW YORK COUNTY. }

Conrad Morris Braker,
Plaintiff,
against

*New York Finance Company, Frank L.
Rabe and Austin B. Fletcher, as
Testamentary Trustee for the said
Conrad Morris Braker, under the
Last Will and Testament of Conrad
Braker, Jr.,*

Defendants.

The defendant Austin B. Fletcher, as trustee as stated above, answering the complaint of the plaintiff,

Reiterating in his own behalf the allegation of the complaint contained in section "18" thereof that the plaintiff notified this defendant that he should not pay any part of the trust fund (the subject of this action) to said defendants Frank L. Rabe and New York Finance Company—this defendant submits the question of his rights and duties as between the said plaintiff and the said defendant New York Finance Company to the determination of this Court.

Wherefore, this defendant demands judgment that this Court determine the ultimate rights of this defendant and said New York Finance Company as to the trust fund mentioned in said complaint.

WILLIAM P. S. MELVIN,

Attorney for Defendant,

Austin W. Fletcher, as Trustee,

165 Broadway,

New York City.

Defendant's Exhibit D

CITY, COUNTY AND STATE OF NEW YORK, ss.:

Austin B. Fletcher, being duly sworn, says, that he is one of the defendants in the above entitled action, that he has read the foregoing answer and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Sworn to before me
this 16th day of } AUSTIN B. FLETCHER.
March, 1911.

S. A. CRUMMEY,
Notary Public,
New York County.

(Endorsed: "Supreme Court, New York County. Conrad Morris Braker, Plaintiff, against New York Finance Company, Frank L. Rabe and Austin B. Fletcher, as testamentary trustee, etc. Defendants' Answer. Wm. P. S. Melvin, Atty. for deft. Austin B. Fletcher, 165 Broadway, Borough of Manhattan, New York City. U. S. District Court. Filed Oct. 8, 1912, S. D. of N. Y. E 7-231.")

Defendant's Exhibit E

DEFENDANT'S EXHIBIT E.

DECISION.

SUPREME COURT, NEW YORK COUNTY.

Conrad Morris Braker,
Plaintiff,
against

*New York Finance Company, Frank
L. Rabe and Austin B. Fletcher, as
Testamentary Trustee for the said
Conrad Morris Braker, under the
Last Will and Testament of Conrad
Braker, Jr.,*

Defendants.

This action having come regularly on for trial before Mr. Justice Samuel Greenbaum, without a jury, at Special Term, Part IV of this Court, on January 24th, 1912, and on January 25th, 1912, and the plaintiff having appeared by Safford A. Crummey, Esq., as attorney, and the defendant New York Finance Company by Asa L. Carter, as attorney (the defendant, Frank L. Rabe, having appeared, but not having pleaded), and the defendant Austin B. Fletcher, as testamentary trustee, for the said Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., by William P. S. Melvin, Esq., his attorney.

After hearing the proofs and allegations on the part of the several parties, I find and decide as fol-

Defendant's Exhibit E

lows, and do separately state the facts found and the conclusions of law as follows:

FINDINGS OF FACT.

1. That the defendant, New York Finance Company, is a corporation duly organized under the laws of the State of New York.
2. That, on July 21, 1890, Conrad Braker, Jr., late of the City and County of New York, the father of this plaintiff, died, leaving a last will and testament, dated February 20, 1890, which was duly admitted to probate by one of the surrogates of New York County, on or about September 13, 1890.
3. That, in and by the 14th clause of said will, the testator devised and bequeathed the sum of \$50,000.00 to Henry J. Braker, to hold the same in trust and to securely invest the same, and to apply the interest or income on the same for the special benefit of this plaintiff, and to pay over the principal thereof to this plaintiff as follows: \$20,000.00 at the expiration of ten years from the date of the death of said testator, or on July 21, 1900; \$20,000.00 at the expiration of fifteen years from the date of the death of said testator, or on July 21, 1905, and \$10,000.00 at the expiration of twenty years from the date of the death of said testator, or on July 21, 1910.
4. That, by an order and decree of the Surrogates' Court of New York County, entered the 16th day of November, A. D. 1897, the defendant, Austin B. Fletcher, was appointed testamentary trustee for the said plaintiff under the said will of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker, and to execute the unexecuted trusts of which Henry J. Braker was trustee under said will.

Defendant's Exhibit E

5. That the said defendant, Austin B. Fletcher, accepted said trusts and came into possession of certain funds belonging to the trust estate, including said fund of \$50,000 of which the plaintiff was beneficiary, as aforesaid.

6. That the plaintiff, Conrad Morris Braker, is the son of Conrad Braker, Jr., and the beneficiary of the trust created in, under and by the 14th clause of his father's will.

7. That this plaintiff, ten years after the death of his said father, namely, on or about July 21, 1900, received from said defendant Austin B. Fletcher the sum of \$20,000.00 of said trust fund, leaving a balance then due of \$30,000.00 of said trust fund, created in, under, and by the 14th clause of the will of said deceased.

8. That during the spring of 1901, the plaintiff was introduced to Arthur W. Depue, who had an office at 45 Broadway, New York City; and the plaintiff applied to him for a loan of money upon the security of a portion of the legacy coming to the plaintiff in February, 1913, under the said will of his father, Conrad Braker, Jr., deceased.

9. That, subsequently and in the early part of April, 1901, the plaintiff received from Arthur W. Depue and associates the sum of \$3500.00, upon executing and delivering to said Arthur W. Depue the instrument dated April 18, 1901, described in Plaintiff's Exhibit B, which, upon its face, purports, in consideration of the sum of one dollar, to sell, assign, transfer and set over, to Frank L. Rabe, seven-tenths of all the estate, right, title and interest of this plaintiff in and

Defendant's Exhibit E

to the legacy of \$50,000.00, to which the plaintiff is entitled in February, 1913, under and by virtue of the conditions of Clause Fifteen of the last will and testament of Conrad Braker, Jr., deceased.

10. That, subsequently the plaintiff applied to the said Arthur W. Depue and associates for a further loan to him by the said Arthur W. Depue and associates, upon the security of a portion of the legacy coming to him under the Fourteenth Clause of the will of his said father.

11. That the plaintiff had previously, by an instrument in writing, dated January 25, 1901, assigned to Mehry R. Loeb, a certain part of the legacy of \$50,000.00 to the plaintiff under the said fourteenth clause of the will of his said father, to wit: one-half of \$20,000.00 thereof, which was to be paid to the plaintiff on July 21, 1905, as collateral security for the repayment of a certain loan of \$5000.00 and interest.

12. That the plaintiff had previously by an instrument in writing, dated February 11, 1901, assigned to William H. Sage, a certain other part of the said legacy of \$50,000.00 to the plaintiff under the said fourteenth clause of the will of his said father, to wit: one-half of the legacy of \$20,000.00 which was to be paid to the plaintiff on July 21, 1905, out of which \$10,000.00 the said Sage was to retain \$8000.00 as collateral security for a loan of \$2500.00.

13. That subsequently and in the month of June, 1901, the said Arthur W. Depue and associates agreed to loan the plaintiff the sum of \$2500.00 for which the plaintiff agreed to repay the said Arthur W. Depue and associates the sum of \$17,000.00 as follows: \$7,000.00 out of the \$20,000.00 legacy coming to the plain-

Defendant's Exhibit E

tiff July 21, 1905, and \$10,000.00 coming to the plaintiff July 21, 1910; and it was further agreed that the plaintiff would transfer two life insurance policies on his life in the Equitable Life Assurance Society, for \$7500.00 each, to the said Arthur W. Depue and associates, as further security.

14. That in anticipation of the making of said loan, plaintiff applied to the Equitable Life Assurance Society for two policies upon his life for a total amount of \$15,000.00 payable to Frank L. Rabe, creditor, and two policies upon plaintiff's life were issued by the Equitable Life Assurance Society and delivered to the said Arthur W. Depue and associates as additional security to said loan of \$2500.00.

15. That as a cover for the said agreement mentioned in plaintiff's finding No. 13, and in order to conceal its real character, and as a cloak and device therefor, the said Arthur W. Depue and associates demanded and received from the plaintiff an instrument (Plaintiff's Exhibit A in evidence), dated June 13, 1901, which, upon its face, purports, in consideration of the sum of one dollar, to sell, assign, transfer and set over unto Frank L. Rabe, any and all the estate, right, title and interest of the plaintiff of, in and to the principal sum of \$50,000.00 to which the plaintiff was entitled under and by virtue of said fourteenth clause of the last will and testament of said Conrad Braker, Jr., deceased, to wit, the sum of \$20,000.00 due the plaintiff on July 21, 1905, as aforesaid, and the sum of \$10,000.00 due the plaintiff on July 21, 1910, as aforesaid, subject to the payment, on July 21, 1905, of the said loan of \$5000.00 made by Mehry R. Loeb, and the payment on July 21, 1905, of \$8000.00 to William H. Sage.

Defendant's Exhibit E

16. That when the plaintiff executed the instrument dated June 13, 1901 (Plaintiff's Exhibit A in evidence), he did so in order to obtain the money previously agreed to be loaned to the plaintiff by Arthur W. Depue and associates; and that said instrument was prepared and executed as a cover for the loan of \$2500.00 previously agreed upon between the plaintiff and the said Arthur W. Depue and associates.

17. That in consideration of said loan of \$2500.00 to the plaintiff, and at the time thereof, the said Arthur W. Depue and associates demanded, took and received the plaintiff's contract and agreement to repay to the said Arthur W. Depue and associates said loan of \$2500.00; and to pay for said loan interest at a rate greatly in excess of 6 per cent. per annum, to wit: \$7000.00 on July 21, 1905, and \$10,000.00 on July 21, 1910, which was at the rate of interest of 64 per cent. per annum and over for said loan.

18. That said Arthur W. Depue was closely associated in business with Frank L. Rabe and Charles H. Burr, all of them being lawyers and residents of the City of Philadelphia, Pa.

19. That at the request of Arthur W. Depue and his associates, the security for the said loan of \$2500 to the plaintiff was taken in the name of Frank L. Rabe; the said life insurance policies in Equitable Life Assurance Society upon the life of plaintiff were made payable to Frank L. Rabe, and the instrument of June 13, 1901 (Plaintiff's Exhibit A in evidence), was made and delivered to Frank L. Rabe.

20. That said Frank L. Rabe acted as a dummy for Arthur W. Depue and associates in making said loan; that the money paid to the plaintiff was furnished by Arthur W. Depue and associates, and no

Defendant's Exhibit E

part of that money was furnished by Frank L. Rabe personally.

21. That the said sum of \$2500.00 was received by the plaintiff in two checks; one check for \$750.00 on June 14, 1901, and another check for \$1750.00 on June 26, 1901; that the plaintiff telephoned to Charles H. Burr, at his office in Philadelphia and demanded that said Burr send said check for \$1750.00 to the plaintiff; and said Burr thereupon sent said check for \$1750.00 to the plaintiff.

22. That on or about the 14th day of August, 1901, the defendant, New York Finance Co., was organized by Arthur W. Depue and his associates and a certificate of the incorporation of the same signed and acknowledged August 14, 1901, by Frank L. Rabe, William H. Cochran, Arthur S. Willdigg, Frank L. A. Graham, and William E. Fritz; was filed September 30, 1901, in the office of the Clerk of New York County (Plaintiff's Exhibit in evidence).

23. That the defendant New York Finance Company was authorized by its charter to loan money on all kinds of personal property.

24. That the amount of capital with which the New York Finance Company began business according to its certificate of incorporation was \$1000.00.

25. That the four shares for which Frank L. Rabe subscribed, were turned over by him to Arthur W. Depue; that the five shares for which Arthur S. Willdigg subscribed, were given to him, and he paid nothing for them; that Frank L. Rabe, at the time, was associated in business with Arthur W. Depue; that Frank L. A. Graham was a young friend of Frank L. Rabe in a law office in Philadelphia; that William H. Cochran was a

Defendant's Exhibit E

lawyer associated with Arthur W. Depue, with office at 45 Broadway, New York City, and Arthur S. Willdigg, who was President of the defendant, New York Finance Company, for six months from the date of its incorporation, was connected with the office of William H. Cochran.

26. That the said Arthur W. Depue, William H. Cochran, Frank L. Rabe, and their associates conducted the business of loaning money under the name of the New York Finance Company and used said Company merely as a cover and cloak for their transactions.

27. That as a cover for the said agreement mentioned in plaintiff's finding No. 13, and in order to conceal its real character, and as a cloak and device therefor and in furtherance of the said business of loaning money of Arthur W. Depue and associates, the said Frank L. Rabe executed an instrument (Plaintiff's Exhibit B, in evidence), dated October 1, 1901, which, upon its face, purports, in consideration of \$10,000.00 to sell, assign, transfer, and set over unto the said defendant New York Finance Company, all his estate, right, title and interest of, in and to the interest of the plaintiff, Conrad Morris Braker under Clause Fourteen in the Will of Conrad Braker, Jr., deceased, described in Plaintiff's Exhibit A, in evidence, as well as the interest of the plaintiff under Clause Fifteen in the Will of Conrad Braker, Jr., deceased, described in the instrument dated April 18, 1901, mentioned in plaintiff's finding No. 9.

28. That fifteen years after the date of the death of said Conrad Braker, Jr., namely, on or about July 21, 1905, the said defendant, Austin B. Fletcher, as trustee as aforesaid, paid to this plaintiff the further

Defendant's Exhibit E

sum of \$20,000.00, due under the said Fourteenth Clause of the Will of said Conrad Braker, Jr., deceased; and the plaintiff, on that date, paid to Mehry R. Loeb, the sum of \$5000.00; to William H. Sage, the sum of \$8000.00; and to the said defendant, the New York Finance Company, the balance of said sum of \$20,000.00, namely, the sum of \$7000.00.

29. That said payment of \$7000.00, made to the defendant New York Finance Company, on or about July 21, 1905, on account of this plaintiff, was in repayment of the said loan of \$2500.00 made by the said Arthur W. Depue and associates, through the defendant, Frank L. Rabe, to this plaintiff, on June 13, 1901, with interest thereon, at the rate of 44 per cent. per annum; and said payment exceeded the amount due upon said loan with legal interest thereon, computed to the date of said payment, by the sum of at least \$3850.00.

30. That pursuant to the provisions of the Fourteenth Clause of the Will of said Conrad Braker, Jr., deceased, there was due and payable to this plaintiff, on July 21, 1910, the balance of \$10,000.00 of the legacy of \$50,000.00, bequeathed to this plaintiff in, under and by the Fourteenth Clause of said Will, which balance of said legacy, amounting to \$10,000.00, has not been paid to this plaintiff.

31. That on or about July 21, 1910, and before the defendants, Frank L. Rabe and New York Finance Company, demanded from the defendant, Austin B. Fletcher, as trustee as aforesaid, the payment of the amount claimed by the defendants, Frank L. Rabe and New York Finance Company, under the alleged assignments, this plaintiff elected to avoid said assignments on the ground of usury, and notified the defendant,

Defendant's Exhibit E

Austin B. Fletcher, as trustee as aforesaid, that this plaintiff objected to the payment of any part of said trust fund on account of any alleged assignments to said defendants, Frank L. Rabe and New York Finance Company.

CONCLUSIONS OF LAW.

I. The agreement between the plaintiff and Arthur W. Depue and associates, entered into on or about June 1, 1901, whereby Arthur W. Depue and associates agreed to loan to the plaintiff the sum of \$2500.00 and to receive therefor from the plaintiff out of the estate of Conrad Braker, Jr., deceased, the sum of \$7000.00 on July 21, 1905, and the further sum of \$10,000.00 on July 21, 1910, was and is usurious and void.

II. The instrument, dated June 13, 1901, executed by the plaintiff to Frank L. Rabe, being Plaintiff's Exhibit "A" in evidence, which, upon its face, purports, in consideration of the sum of one dollar, to sell, assign, transfer, and set over unto Frank L. Rabe any and all the estate, right, title, and interest of the plaintiff of, in, and to the principal sum of \$50,000.00, to which he was entitled under and by virtue of the Fourteenth Clause of the Last Will and Testament of Conrad Braker, Jr., deceased, to wit: the sum of \$20,000.00 due the plaintiff on July 21, 1905; and the sum of \$10,000.00 due the plaintiff on July 21, 1910, subject to the payment on July 21, 1905, of the loan of \$5000.00, made to the plaintiff by Mehry R. Loeb, and subject to the payment to William H. Sage, on July 21, 1905, of \$8000.00, was and is mere cover for an usurious transaction and is usurious and void.

III. The instrument, dated October 1, 1901, executed by Frank L. Rabe to the defendant, New York

Defendant's Exhibit E

Finance Company, being Plaintiff's Exhibit "B" in evidence, which upon its face, purports, in consideration of \$10,000.00, to sell, assign, transfer, and set over unto the defendant, New York Finance Company, all the right, title and interest of said Frank L. Rabe of, in and to the interest of the plaintiff under Clause Fourteen of the Will of Conrad Braker, Jr., deceased, described in Plaintiff's Exhibit "A" in evidence, insofar as it refers to the said instrument of June 13, 1901, executed by the plaintiff to Frank L. Rabe, was and is a mere cover for an usurious transaction and is usurious and void.

IV. The defendants Frank L. Rabe and New York Finance Company acquired no interest under said instruments of June 13, 1901, Plaintiff's Exhibit "A," and October 1, 1901, Plaintiff's Exhibit "B" in said legacy of \$10,000.00, payable to him, July 21, 1910, by and under the Will of his father, Conrad Braker, Jr., deceased, now held in trust for said plaintiff by the defendant, Austin B. Fletcher, or any part thereof.

V. The plaintiff is entitled to judgment directing the defendant Frank L. Rabe and New York Finance Company to deliver up and surrender said instruments of June 13, 1901, Plaintiff's Exhibit "A" and of October 1, 1901, Plaintiff's Exhibit "B," to be cancelled.

VI. The instrument dated June 13, 1901, from the plaintiff to Frank L. Rabe, recorded in the office of the Register of the County of New York, in Liber 4, of Misc. Instruments, page 125, on June 28, 1901, and recorded December 21, 1906, in the office of the Surrogate of New York County, in Liber 3 of "Record of Conveyances and Mortgages of Interest in Decedents' Estate," page 190, should be cancelled of record by the Register of the County of New York and by the Surro-

Defendant's Exhibit E

gate of the County of New York; and the instrument dated October 1, 1901, from Frank L. Rabe to New York Finance Company, recorded December 21, 1906, in the office of the Surrogate of the County of New York, in Liber 3 of "Record of Conveyances and Mortgages of Interest in Decedents' Estates," page 200, should be cancelled of record by the Surrogate of New York County.

VII. The plaintiff is entitled to judgment directing the defendant Austin B. Fletcher, as testamentary trustee for the said Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, to pay over to this plaintiff the said fund of \$10,000.00, with the accumulated interest thereon from July 21, 1910.

VIII. The plaintiff is entitled to the costs and disbursements of the action to be taxed against the defendant New York Finance Company, and an allowance of \$250.00.

January 31, 1912.

SAMUEL GREENBAUM,
Justice of the Supreme Court.

Defendant's Exhibit F

DEFENDANT'S EXHIBIT F.

FINDINGS.

SUPREME COURT, NEW YORK COUNTY.

Conrad Morris Braker,
Plaintiff,
against

*New York Finance Company, Frank
L. Rabe and Austin B. Fletcher, as
Testamentary Trustee for the said
Conrad Morris Braker, under the
Last Will and Testament of Conrad
Braker, Jr.,*

Defendants.

This action having come regularly on for trial before Mr. Justice Samuel Greenbaum, without a jury, at Special Term, Part IV, of this Court, on January 24, 1912, and on January 25, 1912, and the plaintiff having appeared by Safford A. Crummey, Esq., as attorney, and the defendant New York Finance Company by Asa L. Carter, as attorney (the defendant, Frank L. Rabe having appeared, but not having pleaded) and the defendant Austin B. Fletcher as Testamentary Trustee for the said Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., by William P. S. Melvin, Esq., as attorney.

After hearing the proofs and allegations on the part of the several parties, I find and decide as follows, and do separately state the facts found and the conclusions of law, as follows:

Defendant's Exhibit G

FINDINGS OF FACT.

That the defendant, New York Finance Company, did not serve a copy of its answer upon the plaintiff, Austin B. Fletcher, as Testamentary Trustee for the said Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., twenty days before the trial of this action.

CONCLUSIONS OF LAW.

I. The defendant, New York Finance Company, is not entitled to judgment against the defendant Austin B. Fletcher, as Testamentary Trustee for the said Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr.

II. The defendant Austin B. Fletcher, as Testamentary Trustee for the said Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., is entitled to his costs and disbursements.

January 31, 1912.

SAMUEL GREENBAUM,
Justice of the Supreme Court.

DEFENDANT'S EXHIBIT G.

Defendant's Exhibit G (being Judgment in the matter of Conrad Morris Braker against New York Finance Company, Frank L. Rabe and Austin B. Fletcher, as Testamentary Trustee for the said Conrad Morris Braker under the last will and testament of Conrad Braker, Jr., in the Supreme Court, New York County) is Exhibit "C" attached to defendant's Answer at page 123, *supra*, with the following additions, to wit:

Judgment. Deft's Ex. "G." Wm. Parkin.

Defendant's Exhibit H

DEFENDANT'S EXHIBIT H.

REQUESTS TO FIND OF NEW YORK FINANCE
COMPANY.

SUPREME COURT, NEW YORK COUNTY.

Conrad Morris Braker,
Plaintiff,
against

*New York Finance Company, Frank
L. Rabe and Austin B. Fletcher, as
Testamentary Trustee for the said
Conrad Morris Braker, under the
Last Will and Testament of Conrad
Braker, Jr.,*

Defendants.

This action having come regularly on for trial before Mr. Justice Samuel Greenbaum, without a jury, at Special Term, Part IV, of this Court, on January 24th, 1912, and on January 25th, 1912, and the plaintiff having appeared by Safford Crummey, Esq., as attorney, and the defendant New York Finance Company by Asa L. Carter, as attorney (the defendant Frank L. Rabe not having been served did not appear), and the defendant Austin B. Fletcher as testamentary trustee for the said Conrad Morris Braker under the last will and testament of Conrad Braker, Jr., by William P. S. Melvin, Esq., as attorney.

After hearing the proofs and allegations on the part of the several parties, I find and decide as follows

Defendant's Exhibit H

and do separately state the facts found and the conclusions of law, as follows:

FINDINGS OF FACT.

I. That the defendant New York Finance Company is a corporation duly organized under the laws of the State of New York.

II. That on July 21, 1890, Conrad Braker, Jr., late of The City and County of New York, the father of this plaintiff, died, leaving a last will and testament dated February 20, 1890, which was duly admitted to probate by one of the Surrogates of New York County on or about September 13, 1890.

III. That in and by the 14th Clause of said Will the testator devised and bequeathed the sum of \$50,000.00 to Henry J. Braker to hold the same in trust and to securely invest the same and to apply the interest or income on the same for the special benefit of this plaintiff, and to pay over the principal thereof to this plaintiff as follows: \$20,000.00 at the expiration of ten years from the date of the death of said testator; \$20,000.00 at the expiration of fifteen years from the date of the death of said testator, and \$10,000.00 at the expiration of twenty years from the date of the death of said testator.

IV. That by an order and decree of the Surrogates' Court of New York County entered the 16th day of November, A. D. 1897, the defendant Austin B. Fletcher was appointed testamentary trustee for the said plaintiff under the said will of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker and to execute the unexecuted trusts of which Henry J. Braker was trustee under said will.

Defendant's Exhibit H

V. That the said defendant Austin B. Fletcher accepted said trusts and came into possession of certain funds belonging to the trust estate, including said fund of \$50,000.00 of which the plaintiff was beneficiary, as aforesaid.

VI. That this plaintiff ten years after the death of his said father, namely, on or about July 21, 1900, received from said defendant Austin B. Fletcher the sum of \$20,000.00 of said trust fund, leaving a balance then due of \$30,000.00 of said trust fund created in, under and by the 14th clause of the will of said deceased.

VII. That on or about the 13th day of June, 1901, plaintiff, for a good and valuable consideration, granted, bargained, sold, assigned, transferred, and set over unto Frank L. Rabe, his heirs, executors, administrators, and assigns forever, any and all his estate, right, title, and interest, of and in and to the principal sum of Fifty thousand dollars (\$50,000.00) to which he was entitled under and by virtue of the 14th clause of the will of the said decedent aforesaid, subject only to the payment of \$5000.00 to Mehry R. Loeb, with interest from January 25, 1902, and \$8000.00 to William H. Sage, together with the expenses in the collection of the same, which Rabe assignment is recorded in the office of the Register of New York County, Liber 4, of Miscellaneous Instruments, page 125, on or about June 28, 1901.

Refused. Samuel Greenbaum, J. S. C.

VIII. That on or about the 1st day of October, 1901, the aforesaid Frank L. Rabe, for a good and valuable consideration, granted, bargained, sold, assigned, transferred, and set over unto the defendant

Defendant's Exhibit H

New York Finance Company, its successors, and assigns forever, all his estate, right, title, and interest of, in and to the interest of the plaintiff under and by virtue of the 14th Clause of the will of said decedent aforesaid, which Finance Company assignment is recorded in the Surrogates' office of New York County, in Liber 3 of Conveyances and Mortgages of Interests in Decedents' Estates, page 200, on or about December 21, 1906.

Refused. Samuel Greenbaum, J. S. C.

IX. That said assignment from the plaintiff to the defendant Frank L. Rabe was made subject to a prior assignment bearing date January 25, 1901, from this plaintiff to Mehry R. Loeb as collateral security for the repayment of a certain loan of \$5000.00 and interest, and subject further to an assignment from this plaintiff to William H. Sage, bearing date February 11, 1901, of the sum of \$8000.00 payable to this plaintiff on July 21, 1905, under the terms of the said will of said Conrad Braker, Jr., deceased.

Refused. Samuel Greenbaum, J. S. C.

X. That the said defendant Frank L. Rabe assigned to the defendant New York Finance Company by an assignment dated October 1, 1901, and recorded in the Surrogates' office of New York County in Liber 3, page 200 of Assignments on December 21, 1906, at the request of New York Finance Company, all the right, title and interest of the said defendant Frank L. Rabe in the legacy bequeathed to this plaintiff under the 14th Clause of the will of said Conrad Braker, Jr., deceased, theretofore assigned by this plaintiff to the defendant Frank L. Rabe under the assignment hereinbefore described and dated June 13, 1901.

Defendant's Exhibit H

XI. That fifteen years after the date of the death of said Conrad Braker, Jr., namely, on or about July 21, 1905, the said defendant Austin B. Fletcher as trustee as aforesaid paid to and for the account of this plaintiff the further sum of \$20,000.00 due under the said 14th Clause of the will of said Conrad Braker, Jr., deceased, at the date of paying to Mehry R. Loeb the sum of \$5000.00; by paying to William H. Sage the sum of \$8000.00, and by paying to the said defendant New York Finance Company the balance of said sum of \$20,000.00, namely, the sum of \$7000.00 under the assignment hereinbefore mentioned and described.

XII. That on or about October 1, 1901, the said defendant Frank L. Rabe executed an instrument in writing purporting to assign and transfer to the defendant New York Finance Company the interest in said legacy and trust fund claimed to have been assigned to the said defendant Frank L. Rabe by this plaintiff by the said assignment dated June 13, 1901.

CONCLUSIONS OF LAW.

FIRST.—That the defendant New York Finance Company, its successors and assigns, became entitled to receive for its own uses and purposes, and did receive on or about July 21st, 1905, for its own uses and purposes, from the defendant Austin B. Fletcher, as Trustee as aforesaid, the certain sum of Seven thousand dollars (\$7000.00) of the said estate of the plaintiff herein, in and to the estate of the aforementioned Conrad Braker, Jr., deceased, then and there due and payable under the aforementioned "Fourteenth" paragraph of the said decedent's Last Will and Testament, as its own absolutely.

Refused. Samuel Greenbaum, J. S. C.

Defendant's Exhibit H

SECOND.—That the defendant New York Finance Company, its successors and assigns, became entitled to receive and should have received on the 21st day of July, 1910, and is still entitled to receive from the defendant, Austin B. Fletcher, as Trustee as aforesaid, the further part or portion of the estate and interest of the plaintiff herein, in and to the estate of Conrad Braker, Jr., deceased, to wit: the balance of the legacy of Fifty thousand dollars (\$50,000) amounting to Ten thousand dollars (\$10,000) with interest from the 21st day of July, 1910.

Refused. Samuel Greenbaum, J. S. C.

THIRD.—That the complaint herein be dismissed as to this defendant, New York Finance Company.

Refused. Samuel Greenbaum, J. S. C.

FOURTH.—That the defendant, Austin B. Fletcher, as Testamentary trustee for the said Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, is directed to pay to this defendant New York Finance Company, its successors, and assigns, the balance of Ten thousand dollars (\$10,000) now due and payable to it as hereinbefore specifically set forth and prescribed, together with interest from the 21st day of July, 1910.

Refused. Samuel Greenbaum, J. S. C.

FIFTH.—That the defendant, New York Finance Company is awarded costs which are hereby directed to be taxed and payable by the plaintiff, and defendant Austin B. Fletcher as testamentary trustee of the said Conrad Morris Braker under the last will and testament of Conrad Braker, Jr., to the attorney for the said defendant Company.

Refused. Samuel Greenbaum, J. S. C.

Defendant's Exhibit H

SIXTH.—That judgment should be entered herein according to the foregoing.

Refused. Samuel Greenbaum, J. S. C.

Dated, January 31, 1911.

In addition to the requests specifically refused as indicated in the margin all of the other findings requested are refused, for the reason that some of them are founded upon plaintiff's requests and others I do not deem necessary to specifically find.

SAMUEL GREENBAUM,
J. S. C.

(Endorsed: "Defts. Exhibits A to C and E to N. E 7-231. Co. Clerk's No. 25,862—1911. Supreme Court, New York County, Conrad Morris Braker, plaintiff, against New York Finance Company, Frank L. Rabe and Austin B. Fletcher as testamentary trustee for the said Conrad Morris Braker under the last Will and Testament of Conrad Braker, Jr., deceased, defendant, New York Finance Company, defendant. Judgment Roll, filed Feb. 5, 1912. U. S. District Court, filed Oct. 8, 1912, S. D. of N. Y. Asa L. Carter, Attorney for Appellant, 60 Wall Street, New York City. Safford A. Crummey, Attorney for Plaintiff, 165 Broadway, N. Y. City. William P. S. Melvin, Attorney for defendant, Austin B. Fletcher, 165 Broadway, N. Y. City.")

Defendant's Exhibit I

DEFENDANT'S EXHIBIT I.

At a Term of the Appellate Division of the Supreme Court, held in and for the First Judicial Department in the County of New York, on the 7th day of June, 1912.

Present—HON. GEORGE L. INGRAHAM,

Presiding Justice.

“ FRANK C. LAUGHLIN,
“ JOHN PROCTOR CLARKE,
“ NATHAN L. MILLER,
“ VICTOR J. DOWLING,

Justices.

Conrad M. Braker,
vs. Respd.,

New York Finance Company,
Appls.

Impleaded with Austin B. Fletcher,
as Testamentary Trustee,
etc.,

and another. Respds.,

Order Granting
Motion to Dis-
miss Appeal.

An appeal to this Court having been taken by the defendant New York Finance Co., from a judgment of the Supreme Court duly entered on the 5th day of February, 1912, and the defendant-respondent having moved to dismiss said appeal,

Now upon reading and filing the notice of motion with proof of due service thereof and the affidavit of William P. S. Melvin in support of said motion, and after hearing Mr. William P. S. Melvin for the motion,

Defendant's Exhibit I

It is hereby unanimously ordered that the motion to dismiss said appeal be and the same is hereby granted with \$10 costs.

APPELLATE DIVISION OF THE SUPREME COURT,
FIRST JUDICIAL DEPARTMENT,
CLERK'S OFFICE, COUNTY OF NEW YORK. }

I, Alfred Wagstaff, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order made by said court upon the appeal in the above entitled action or proceeding, and entered in my office on the 7th day of June, 1912, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed the seal of said
(Seal) Court, in the County of New York, this
11th day of June, 1912.

ALFRED WAGSTAFF,
Clerk.

(Endorsed: "Appellate Division of the Supreme Court, First Judicial Department. Conrad Morris Braker, Respt., vs. N. Y. Finance Company, Applt., impleaded with Austin B. Fletcher as testamentary trustee, etc., Respdt., and another. Certified copy order granting motion to dismiss appeal. William P. S. Melvin, Attorney for deft. Respt. Office & P. O. address 165 Broadway, Borough of Manhattan, New York City. U. S. District Court. Filed Oct. 8, 1912, S. D. of N. Y. E 7-231.")

Defendant's Exhibit J

DEFENDANT'S EXHIBIT J.

April 29, 1911.

Mr. John A. S. Brown,
Franklin Building, Philadelphia, Pa.

Dear Sir:

I am informed that you and Frank Schermerhorn, as trustees, loaned \$10,000.00 to the New York Finance Company in December, 1906, and received as collateral security therefor a note payable July 21, 1910, and an assignment from the New York Finance Company of certain legacies due Conrad Morris Braker under the Will of his father, Conrad Braker, Jr.

I represent Mr. Braker, who has commenced an action in the Supreme Court of this State to have the assignments made by him to Frank L. Rabe, which were assigned by Rabe to the New York Finance Company, of the aforesaid legacies declared null and void.

I did not learn until recently that the New York Finance Company had made an assignment to you and Frank E. Schermerhorn, as trustees; and I write to ascertain whether you claim any present interest under said assignment, or whether the loan has been paid.

I will appreciate a prompt answer from you.

Very truly yours,

S. A. C.

(Endorsed: "E. 7-231. U. S. District Court. Filed
Oct. 8, 1912. S. D. of N. Y.")

Defendant's Exhibit K

DEFENDANT'S EXHIBIT K.

Jno. A. S. Brown,
701 Franklin Bank Bldg.,
Philadelphia.

Philadelphia, Pa., June 13th, 1911.

Safford A. Crummey, Esq.,
No. 165 Broadway,
New York City, N. Y.

Dear Sir:

I beg to acknowledge the receipt of your communication of April 29th, 1911.

Replying to same, I beg to advise you that on December 19th, 1906, I, in conjunction with Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, loaned to the New York Finance Company, Ten thousand dollars (\$10,000), which was secured to us by the Company's note payable July 21st, 1910, and an assignment of certain of the Company's interests in the Estate of Conrad Braker, Jr., deceased. This assignment fully sets forth the interests thus assigned to us, and is a matter of record in the Surrogate's Court of New York County; and you can refer to the same for further information in the matter.

I also beg to advise you that the New York Finance Company, having defaulted in the payment of this note, and certain interest due thereon, that Mr. Schermerhorn and myself caused the above mentioned collateral security to be sold at public auction, in this city; and that it was so sold to one Charles Z. Wolff. We have now taken title from Mr. Wolff to these in-

Defendant's Exhibit K

terests, and are the legal owners and holders of the same.

We have notified the trustee of the Braker estate Mr. Austin B. Fletcher, that we hold these interests as above, and also have demanded payment to us in the matter.

Yours very truly,

JNO. A. S. BROWN.

(Endorsed: "E 7-231. U. S. District Court. Filed,
Oct. 8, 1912. S. D. of N. Y.")

Defendant's Exhibit L

DEFENDANT'S EXHIBIT L.

SURROGATES' COURT OF THE COUNTY OF NEW YORK.

In the Matter

of

*The Accounting of Austin B. Fletcher,
as Testamentary Trustee for Con-
rad Morris Braker, under the Last
Will and Testament of Conrad Bra-
ker, Jr., deceased.*

To the Surrogates' Court of the County of New York:

The petition of Austin B. Fletcher respectfully shows to this court:

1st. That, on July 21, 1890, Conrad Braker, Jr., late of the City and County of New York, died, leaving a Last Will and Testament, dated February 20, 1890, which was duly admitted to probate by one of the Surrogates of New York County, on or about September 13, 1890.

2d. That, in and by the 14th Clause of said Will, the testator devised and bequeathed the sum of \$50,000 to Henry J. Braker, to hold the same in trust and to securely invest the same and to apply the interest or income of the same for the special benefit of his son Conrad Morris Braker, and to pay over the principal thereof to his said son, as follows: \$20,000.00 at the expiration of ten years from the date of the death of said testator; \$20,000.00 at the expiration of fifteen years from the date of the death of said testator; and \$10,000.00 at the expiration of twenty years from the date of the death of said testator.

Defendant's Exhibit L

3d. That, by an order and decree of the Surrogates' Court, entered the 16th day of November, 1897, your petitioner was appointed testamentary trustee for the said Conrad Morris Braker, under the said Will of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker and to execute the unexecuted trusts, of which Henry J. Braker was trustee under the 14th Clause of said Will.

4th. That your petitioner accepted said trust, and came into possession of said fund of \$50,000, to be held in trust for Conrad Morris Braker, under the provisions of Clause 14 of said Will; that your petitioner kept said trust fund of \$50,000 invested and paid over the income therefrom to Conrad Morris Braker, in accordance with the terms of Clause 14 of said Will.

5th. That your petitioner, ten years after the death of Conrad Braker, Jr., namely on or about July 21, 1900, paid to Conrad Morris Braker the sum of \$20,000 out of the said trust fund; that your petitioner, on or about July 21, 1905, paid to Conrad Morris Braker the sum of \$20,000 out of said trust fund, leaving a balance of said trust fund in your petitioner's hands of \$10,000, the income of which your petitioner continued to pay to Conrad Morris Braker up to July 21, 1910, when the said sum of \$10,000 was payable to Conrad Morris Braker under the terms of Clause 14 of said Will.

6th. That your petitioner is desirous of accounting for the said trust fund of \$50,000 and the income received thereon, and for the balance of \$10,000 still remaining in your petitioner's hands with the interest accumulated thereon from July 21, 1910.

7th. That persons and corporations other than Conrad Morris Braker claim some interest in said fund

Defendant's Exhibit L

of \$10,000 remaining in your petitioner's hands; claiming under an assignment of the same made by Conrad Morris Braker, namely: Frank L. Rabe, New York Finance Company, which is a corporation organized under the laws of the State of New York, as your petitioner is informed and believes, John A. S. Brown, and Frank E. Schermerhorn, as trustees for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, and Charles Z. Wolff.

8th. That an action was commenced in the Supreme Court of the State of New York, New York County, on or about February 2, 1911, by Conrad Morris Braker against your petitioner and the New York Finance Company and Frank L. Rabe; that it is alleged in the complaint that Conrad M. Braker, on or about June 13, 1901, executed to Frank L. Rabe an assignment in and by which he transferred and set over to Frank L. Rabe all the interest of said Conrad Morris Braker in said trust fund, created in, under and by the 14th Clause of the Will of his said father, subject to two other assignments, as security for a loan to him of the sum of \$2500.00; that said loan was paid by the payment to the New York Finance Company, on July 21, 1905, of the sum of \$7000.00; that said loan of \$2500 was at an usurious rate, and said Conrad Morris Braker asked that the said assignment made by him to said Frank L. Rabe and by said Frank L. Rabe to New York Finance Co. be cancelled, and that your petitioner be required to pay to said Conrad Morris Braker the balance of the said trust fund, namely, \$10,000 in your petitioner's hands, with interest from the 21st day of July, 1910; that the New York Finance Company appeared in said action and served an answer in which answer the New York Finance Company asked for a judgment requiring your petitioner to pay

Defendant's Exhibit L

over to them the said sum of \$10,000 of said trust fund remaining in your petitioner's hands with the accumulated interest thereon, claiming under a series of assignments from Conrad Morris Braker to Frank L. Rabe, and from Frank L. Rabe to the New York Finance Company; that your petitioner appeared in said action and served an answer.

9th. That, upon the trial of said action, a judgment was entered, February 5, 1912, in favor of the plaintiff and against your petitioner, ordering and directing your petitioner to pay over to the said Conrad Morris Braker the said sum of \$10,000; the said trust fund remaining in your petitioner's hands, with interest thereon from July 21, 1910; from which said judgment your petitioner has not appealed, and the time to appeal therefrom has expired; but the New York Finance Company has served a notice of appeal from said judgment.

10th. That, on or about the 4th day of October, 1911, an action was commenced against your petitioner as testamentary trustee for Conrad Morris Braker, in the Circuit Court of the United States for the Southern District of New York, in which action John A. S. Brown and Frank E. Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, are complainants; in which action the complainants ask for a judgment requiring your petitioner to pay over to them the said sum of \$10,000 of said trust fund remaining in your petitioner's hands, with the accumulated interest thereon, claiming under a series of assignments from Conrad Morris Braker, through Frank L. Rabe, New York Finance Company, and Charles Z. Wolff, to them; that said action is now pending, and your petitioner is required to answer or plead to the

Defendant's Exhibit L

bill of complaint on or before the 26th day of March, 1912.

11th. That, before the 21st day of July, 1910, Conrad Morris Braker notified your petitioner in writing not to pay the said balance of \$10,000 of said trust fund to Frank L. Rabe or any person or corporation claiming under said assignment from Conrad Morris Braker to Frank L. Rabe, dated June 13, 1901.

12th. That your petitioner is desirous of rendering his account to the Surrogates' Court of New York County of his administration of said trust fund of \$50,000, and to pay over the balance of \$10,000 of said trust fund now remaining in your petitioner's hands, with the interest accumulated thereon from July 21, 1910, to such person or persons or corporations as may be found to be legally entitled to the same, to the end that your petitioner may be forever discharged from any further responsibility or liability on account of the said trust under the 14th Clause of the Will of said Conrad Braker, Jr.

13th. That all the parties claiming an interest in said trust fund, namely, Conrad Morris Braker, Frank L. Rabe, New York Finance Company, John A. S. Brown, and Frank E. Schermerhorn, as trustees for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, and Charles Z. Wolff are of full age and sound mind and all are residents of the State of New York, except Frank L. Rabe, John A. S. Brown, Frank E. Schermerhorn, and Charles Z. Wolff, all of whom are residents of the City of Philadelphia, in the State of Pennsylvania.

WHEREFORE, your petitioner herewith presents his account of the administration of said trust under the 14th Clause of the Will of Conrad Braker, Jr., deceased,

Defendant's Exhibit L

and asks that a citation of this court be issued citing all parties who may claim an interest in said trust fund created by said Clause of said Will to appear at a stated term of the Surrogates' Court, New York County, at a stated time and to there and then show cause why a decree should not be made settling the account of your petitioner as trustee of said trust fund, and determining the rights of the various parties among themselves, and directing to whom said fund of \$10,000 and the accumulated interest thereon shall be paid, and discharging your petitioner from all further responsibility and liability on account of said trust fund remaining in your petitioner's hands.

Dated, New York, March 15th, 1912.

AUSTIN B. FLETCHER,
Petitioner.

CITY, COUNTY AND STATE OF NEW YORK, ss.:

Austin B. Fletcher, being duly sworn, says that he has read the foregoing petition and knows the contents thereof and that the same is true.

Sworn to before me this
15th day of March, 1912. } AUSTIN B. FLETCHER.

HENRY SILLCOCKS,
Notary Public,
New York County.

Defendant's Exhibit M

DEFENDANT'S EXHIBIT M.

 SURROGATES' COURT OF THE COUNTY OF NEW YORK.

*In the Matter**of*

*The Accounting of Austin B. Fletcher,
as Testamentary Trustee for Con-
rad Morris Braker, under the Last
Will and Testament of Conrad Bra-
ker, Jr., deceased.*

To the Surrogates' Court of the County of New York:

I, Austin B. Fletcher, Trustee for Conrad Morris Braker, under the 14th Clause of the Last Will and Testament of Conrad Braker, Jr., deceased, do hereby render the following account of my proceedings as such trustee:

On the 16th day of November, 1897, I was appointed trustee for the said Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, to succeed the trustees named in said Will, and to execute the unexecuted trust mentioned and described in the 14th Clause of said Will. I accepted said trust and received from Henry J. Braker, one of the trustees named in said Will, the amount of the fund mentioned in said 14th Clause of said Will, namely the sum of \$50,000.00

In accordance with the terms of said 14th Clause of said Will, I paid to and for Conrad Morris Braker, on principal,
on July 21, 1900.....\$20,000.00
and on July 21, 1905.....\$20,000.00 \$40,000.00

Balance of principal in my hands \$10,000.00

Defendant's Exhibit M

I have also received the income from the investment of said trust fund, and have paid it semi-annually to and for the benefit of Conrad Morris Braker, up to July 21, 1910, less my commissions; and I now have in hand, in addition to the above amount of principal, the interest on \$10,000 at three per cent. from July 21, 1910, which amount of principal and interest is to be distributed to those entitled thereto, subject to the deductions of the amount of my commissions and the expense of this accounting.

AUSTIN B. FLETCHER,
Trustee for Morris Conrad Braker.

Defendant's Exhibit M

SURROGATES' COURT, COUNTY OF NEW YORK.

*In the Matter**of*

The Judicial Settlement of the Accounting of Austin B. Fletcher, as Testamentary Trustee for Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., deceased.

COUNTY OF NEW YORK, ss.:

I, Austin B. Fletcher, of the City of New York, being duly sworn, say that the charges made in the foregoing account of proceedings and schedules annexed, for moneys paid by me to creditors, legatees and next of kin, and for necessary expenses, are correct; that I have been charged therein all the interest for moneys received by me and embraced in said account, for which I am legally accountable; that the moneys stated in said account as collected, were all that were collectible, according to the best of my knowledge, information and belief, on the debts stated in such account at the time of this settlement thereof; that the allowances in said account for the decrease in the value of any assets, and the charges therein for the increase in such value, are correctly made; and that I do not know of any error in said account or anything omitted therefrom which may in any wise prejudice the rights of any party interested in said estate. And deponent further says that the sums, under twenty dollars charged in the said account, for which no vouchers or other evidences of payment are produced, or for which I may not be able to produce vouch-

Defendant's Exhibit M

ers or other evidences of payment, have actually been paid and disbursed by me as charged; and that said account contains, to the best of my knowledge and belief, a full and true statement of all my receipts and disbursements on account of the estate of said decedent, and of all money and other property belonging to said estate which have come into my hands, or which have been received by any other person by my order of authority for my use, and that I do not know of any error or omission in the account to the prejudice of any creditor of or person interested in the estate of the decedent.

Sworn to before me this
 15th day of March, } AUSTIN B. FLETCHER.
 1912.

HENRY SILLCOCKS,
Notary Public,
 New York County.

(Endorsed: "Surrogates' Court, County of New York.

In the matter of the Judicial Settlement of the Account of Austin B. Fletcher, as testamentary trustee for Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., deceased. Account of Proceedings, filed, William P. S. Melvin, Attorney for the Trustee, office & P. O. address 165 Broadway, Borough of Manhattan, New York City.")

Defendant's Exhibit N

DEFENDANT'S EXHIBIT N.

THE PEOPLE OF THE STATE OF NEW YORK,

By THE GRACE OF GOD, FREE AND INDEPENDENT.

To Conrad M. Braker, New York Finance Company, John A. S. Brown, Frank E. Schermerhorn, as trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, and Charles Z. Wolff and to all persons interested in the Estate of Conrad Braker, Jr., late of the County of New York, deceased, as creditors, legatees, next of kin or otherwise,

SEND GREETING:

You and each of you are hereby cited and required personally to be and appear before our Surrogate of the County of New York, at the Surrogate's Court of said County, held at the County Court House in the County of New York, on the 14th day of May, 1912, at half-past ten o'clock in the forenoon of that day, then and there to attend a judicial settlement of the account of proceedings of Austin B. Fletcher as substituted testamentary trustee for Conrad Morris Braker, under the Last Will and Testament of said deceased, and such of you as are hereby cited, as are under the age of twenty-one years, are required to appear by your guardian, if you have one, or if you have none, to appear and apply for one to be appointed, or in the event of your neglect or failure to do so, a guardian will be appointed by the Surrogate to represent and act for you in the proceeding.

Defendant's Exhibit N

IN TESTIMONY WHEREOF, We have caused the Seal of the Surrogates' Court of the said County of New York to be hereunto affixed.

Witness, HON. ROBERT LUDLOW FOWLER, a
(L. S.) Surrogate of our said County, at the
County of New York, the 16th day of
March, in the year of our Lord, one thousand nine hundred and twelve.

DANIEL J. DOWDNEY,
Clerk of the Surrogates' Court.

Defendant's Exhibit O

DEFENDANT'S EXHIBIT O.

SURROGATES' COURT, NEW YORK COUNTY.

*In the Matter
of*

*The Accounting of Austin B. Fletcher,
as Testamentary Trustee for Con-
rad Morris Braker, under the Last
Will and Testament of Conrad Bra-
ker, Jr., deceased.*

CITY, COUNTY AND STATE OF NEW YORK, ss.:

William P. S. Melvin, being duly sworn, says that he is the attorney for petitioner herein; that the petition herein was filed in the Surrogates' Office, on March 16, 1912; and a citation was thereupon issued citing Conrad Morris Braker, Frank L. Rabe, New York Finance Company, John A. S. Brown, Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, and Charles Z. Wolff, to be and appear before one of the Surrogates of the County of New York, at the Surrogates' Court of said County, to be held at the Hall of Records in the County of New York, on the 14th day of May, 1912, at 10.30 o'clock A. M., to attend a judicial settlement of the accounts and proceedings of Austin B. Fletcher, as substituted testamentary trustee for Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased; that all of the above named persons so cited except Conrad M. Braker are non-resident of the State of New York; and they reside, as deponent is informed and believes, in the City of Philadelphia,

Defendant's Exhibit O

State of Pennsylvania; that the sources of deponent's information are as follows: deponent learned from an examination of the deposition made by Frank L. Rabe in an action pending in the Supreme Court, New York County, in which Conrad Morris Braker is the defendant and the New York Finance Company and Frank L. Rabe are defendants; that Frank L. Rabe has an office and resides in the City of Philadelphia, Pennsylvania; that, at the time of said examination, deponent learned from Charles H. Burr, a Philadelphia lawyer, who attended at the taking of the deposition, that John A. S. Brown and Frank E. Schermerhorn reside in the City of Philadelphia, Pennsylvania; that an examination of the city directory of 1911, of the City of Philadelphia discloses that Frank L. Rabe has a place of business at 302 North American Building and resides at 5109 Chester Avenue, Philadelphia, Penn.; that John A. S. Brown has a place of business at 701 Franklin Bank Building and resides at 1524 No. 17th Street, Philadelphia, Penn.; that Frank E. Schermerhorn is treasurer of the Smith & Furbish Company, at Kensington, in the suburbs of Philadelphia, and resides at 416 So. 45th Street, Philadelphia, Penn.; that Charles Z. Wolff has a place of business at 973 Drexel Building and resides at 739 Lehigh Avenue, Philadelphia, Penn.; that deponent has also seen letters from John A. S. Brown and Frank E. Schermerhorn dated and written at Philadelphia, Penn.

Sworn to before me
 this 20th day of } WILLIAM P. S. MELVIN.
 March, 1912.

JOHN G. DAUSET,
Notary Public,
 Kings County.

Certificate filed in N. Y. Co.

Defendant's Exhibit P

DEFENDANT'S EXHIBIT P.

At Chambers of the Surrogates' Court, held in and for the County of New York at the Surrogates' Office in the County of New York, on the 21st day of March, in the year one thousand nine hundred and twelve.

Present—HON. ROBERT LUDLOW FOWLER, *Surrogate*.

*In the Matter
of*

*The Judicial Settlement of the Account
of Austin B. Fletcher, as Testamentary
Trustee for Conrad Morris
Braker under the Last Will and Testament
of Conrad Braker, Jr., deceased.*

Order of
Publication.

Upon filing the verified petition of Austin B. Fletcher as testamentary trustee for Conrad Morris Braker under the last will and testament of Conrad Braker, Jr., late of the County of New York, deceased, by which the petitioner has made proof to my satisfaction that Frank L. Rabe, New York Finance Company, John A. S. Brown, Frank E. Schermerhorn as trustee for Clara Schermerhorn under the last will and testament of Clara Schermerhorn, deceased, and Charles Z. Wolff claim some interest in the trust fund mentioned in Clause 14 of the will of said deceased to be accounted for in this proceeding; and that Frank L. Rabe, John A. S. Brown, Frank E. Schermerhorn and Charles Z. Wolff are not residents of this State; and it further appearing by the affidavit of William

Defendant's Exhibit P

P. S. Melvin, verified March 20, 1912, that personal service of the citation herein cannot, with due diligence, be made upon them within the State,

Now, on motion of William P. S. Melvin, of counsel for the said Austin B. Fletcher as trustee, etc., petitioner, it is hereby

ORDERED, that the service of the citation in the above entitled matter upon the aforesaid persons, namely: Frank L. Rabe, John A. S. Brown, Frank E. Schermerhorn as trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, and Charles Z. Wolff, be made by publication thereof in two newspapers, to wit: in the New York Law Journal, published in the County of New York, and in the New York Commercial, published in the County of New York, once a week for six successive weeks, or, at the option of the petitioner, by delivering a copy of the citation to each of the above named persons in person without the State, and it is further

ORDERED AND DIRECTED, that on or before the date of the first publication, the petitioner deposit in the post office at the County of New York, City of New York, sets of a copy of the citation and of this order, each set contained in a securely sealed, postpaid wrapper directed to the following persons respectively at the place designated below: Frank L. Rabe, at 5109 Chester Ave., Philadelphia, Pa., John A. S. Brown at 1524 No. 17th Street, Philadelphia, Pa., Frank E. Schermerhorn, as trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, at 416 So. 45th Street, Philadelphia, Pa., Charles Z. Wolff at 739 Lehigh Avenue, Philadelphia, Pa.

ROBERT LUDLOW FOWLER,

Surrogate.

Defendant's Exhibit Q

DEFENDANT'S EXHIBIT Q.

SURROGATE'S COURT, NEW YORK COUNTY.

*In the Matter**of*

*The Judicial Settlement of the Account
of Austin B. Fletcher, as Testamen-
tary Trustee, etc.*

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.:

Edwin F. Crane, being duly sworn, says that he is over the age of twenty-one years; that he made service of the annexed citation in the above entitled proceeding on John A. S. Brown, whom deponent knew to be the person mentioned and described in said citation, by delivering to and leaving with him personally a true copy of said citation on the 12th day of April, 1912, at Room 701 Franklin Bank Building, Philadelphia, Penn.

Sworn to before me this }
19th day of April, 1912. } EDWIN F. CRANE.

WINFIELD S. WALKER,
(Seal) Notary Public.

Commission expires Jan. 19, 1915.

Hereto annexed is the certificate of Henry F. Walton, Protho Notary of the City of Philadelphia, and Clerk of the Court of Common Pleas of said County.

Defendant's Exhibit R

DEFENDANT'S EXHIBIT R.

SURROGATE'S COURT, NEW YORK COUNTY.

*In the Matter**of*

*The Judicial Settlement of the Account
of Austin B. Fletcher, as Testamen-
tary Trustee, etc.*

CITY, COUNTY AND STATE OF NEW YORK, ss.:

Safford A. Crummev, being duly sworn, says that he is over the age of twenty-one years; that he made service of the annexed citation in the above entitled proceeding on the persons named below whom deponent knew to be the persons mentioned and described in the citation, by delivering to and leaving with each of them personally a true copy of said citation, as follows: On the 10th day of April, 1912, at the office of Smith-Furbish Company, Kensington, Philadelphia, Penn., on Frank E. Schermerhorn; and at the office of the State Insurance Department in the Arcade Building in the City of Philadelphia, Penn., on Charles Z. Wolff.

Sworn to before me
this 16th day of April, 1912. } SAFFORD A. CRUMMEY.

JOHN G. DANIEL,
Notary Public,
Kings County.

Certificate filed in N. Y. County, No. 76.

Defendant's Exhibit S

DEFENDANT'S EXHIBIT S.

SUPREME COURT, NEW YORK COUNTY.

*In the Matter
of*

*The Accounting of Austin B. Fletcher,
as Testamentary Trustee for Conrad
Morris Braker, under the Last Will
and Testament of Conrad Braker,
Jr., deceased.*

Conrad Morris Braker, appearing in this proceeding by Safford A. Crummey, his attorney, in answer to the petition:

I. Admits the allegations contained in paragraphs numbered 1st, 2nd, 3rd, 4th, 5th and 11th of the petition.

II. Admits the allegations contained in paragraphs numbered 8th and 9th, and further alleges that at the trial of the action in the Supreme Court of the State of New York therein mentioned, the New York Finance Company appeared and participated in the trial, and judgment was thereupon rendered and entered on February 5, 1912, that the assignment dated June 13, 1901, from Conrad M. Braker to Frank L. Rabe, and the assignment dated October 1, 1901, from Frank L. Rabe to New York Finance Company were and are usurious and void; that Frank L. Rabe and New York Finance Company acquired no interest under said instruments of June 13, 1901 and October 1, 1901, in the legacy of \$10,000.00 payable to Conrad Morris Braker on July 21, 1910, under the will of his

Defendant's Exhibit S

father Conrad Braker, Jr., deceased, and ordering Frank L. Rabe and New York Finance Company to deliver up and surrender said instruments of June 13, 1901, and October 1, 1901, to be cancelled, and ordering the Register of the County of New York to cancel of record in his office the instrument dated June 13, 1901, from Conrad Morris Braker to Frank L. Rabe, and the Surrogate of New York County to cancel of record in his office the instrument dated June 13, 1901, from Conrad Morris Braker to Frank L. Rabe, and the Surrogate of New York County to cancel of record in his office the instrument dated June 13, 1901, from Conrad Morris Braker to Frank L. Rabe, and the Surrogate of New York County to cancel of record in his office the instrument dated October 1, 1901, from Frank L. Rabe to New York Finance Company in so far as it refers to said instrument of June 13, 1901.

III. Admits the allegations contained in paragraph 10th of the petition, but alleges that John A. S. Brown and Frank E. Schermerhorn as trustees for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, mentioned in said paragraph as complainants in said action, had notice of the pendency of said action in the Supreme Court of the State of New York mentioned and described in paragraphs 8th and 9th of the petition, in this proceeding shortly after said action in the Supreme Court was commenced and before judgment was entered therein.

IV. Alleges said John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, have no interest in the said trust fund of \$10,000 to be administered upon in this proceeding.

Defendant's Exhibit S

V. Alleges that Conrad Morris Braker is entitled to receive said fund of \$10,000 and accumulated interest from July 21, 1910, less the commissions and expenses of the trustee and the expenses of this accounting.

WHEREFORE, Conrad Morris Braker asks that the decree of this Court be made awarding to him the said fund of \$10,000 and accumulated interest from July 21, 1910, less the commissions and expenses of the trustee and the expenses of this accounting.

SAFFORD A. CRUMMEY,
Attorney for Conrad Morris Braker,
Office & Post Office Address,
165 Broadway,
Borough of Manhattan,
New York City.

CITY, COUNTY AND STATE OF NEW YORK, ss.:

Conrad Morris Braker, being duly sworn, says that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters which are therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

CONRAD MORRIS BRAKER.

Sworn to before me this
11th day of May, 1912.

HENRY SILLCOCKS,
Notary Public No. 105,
New York County.

Defendant's Exhibit T

DEFENDANT'S EXHIBIT T.

SURROGATES' COURT OF THE COUNTY OF NEW YORK.

In the Matter

of

*The Accounting of Austin B. Fletcher,
as Testamentary Trustee for Conrad
Morris Braker, under the Last Will
and Testament of Conrad Braker,
Jr., deceased.*

ANSWER OF CHARLES Z. WOLFF.

The answer of Charles Z. Wolff to the petition of Austin B. Fletcher, testamentary trustee for Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, filed in the above-entitled matter.

In answer to the said petition, I, Charles Z. Wolff, says, as follows:

1. That I have no interest, claim or demand whatsoever, of any kind or nature, of in or to the trust fund which is the subject of consideration in said petition or of, in or to the determination of the matters and things for which prayer is made in said petition.

(Signed) CHARLES Z. WOLFF.

Defendant's Exhibit T

CITY AND COUNTY OF PHILADELPHIA, } ss.:
STATE OF PENNSYLVANIA,

Charles Z. Wolff, being duly sworn, deposes and says: that he is the person mentioned in and who makes the foregoing answer, and that the matters alleged therein are true.

(Signed) CHARLES Z. WOLFF.

(Signed) GEORGE KOPPENHOEFER, JR.,
(Seal) *Notary Public.*

My Commission expires, March 10, 1913.

County Clerk's Certificate attached.

Defendant's Exhibit U

DEFENDANT'S EXHIBIT U.

SURROGATES' COURT OF THE COUNTY OF NEW YORK.

*In the Matter
of*

*The Accounting of Austin B. Fletcher,
as Testamentary Trustee for Conrad
Morris Braker, under the Last Will
and Testament of Conrad Braker,
Jr., deceased.*

ANSWER OF NEW YORK FINANCE COMPANY.

The answer of NEW YORK FINANCE COMPANY to the petition of Austin B. Fletcher, testamentary trustee for Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, filed in the above-entitled matter.

In answer to the said petition, New York Finance Company saith, as follows:

1. That it has no interest, claim or demand whatsoever, of any kind or nature, of, in or to the trust fund which is the subject of consideration in said petition or of, in or to the determination of the matters and things for which prayer is made in said petition.

NEW YORK FINANCE COMPANY,

(Signed)

(Seal)

By WILLIAM E. FRITZ,
Treasurer.

Defendant's Exhibit U

CITY AND COUNTY OF PHILADELPHIA, } ss.:
 STATE OF PENNSYLVANIA,

William E. Fritz, being duly sworn, deposes and says: that he is the Treasurer of the New York Finance Company, the corporation mentioned in and which makes the foregoing answer; that, as such officer, he has full and due authority to make, and does make this proof for and on behalf of the said New York Finance Company; that he has read the foregoing answer, and that the matters alleged therein are true.

Sworn and subscribed before me this 13th day of May, A. D. 1912. } (Signed)
 WILLIAM E. FRITZ.

(Signed) GEORGE KOPPENHOEFER, JR.,
 (Seal) Notary Public.

My commission expires, March 10, 1913.

County Clerk's Certificate attached.

(Exhibits "L" to "U" all fastened together and endorsed as follows: "Surrogates' Court N. Y. County. In the matter of the accounting of Austin B. Fletcher as testamentary trustee for Conrad Morris Braker under the Last Will and testament of Conrad Braker, Jr., deceased. Copies of All Papers in this Proceeding. Wm. P. S. Melvin, Atty. for Austin B. Fletcher as trustee, etc., Office & P. O. address 165 Broadway, Borough of Manhattan, New York City. U. S. District Court, filed Oct. 8, 1912. S. D. of N. Y. E 7-231.")

Defendant's Exhibit V

DEFENDANT'S EXHIBIT V.

U. S. DISTRICT CT., SOUTHERN DIST. OF N. Y.

At a Surrogate's Court held in and for the County of New York, at the Surrogate's Office in the City of New York, on the 2d day of August in the year one thousand nine hundred and twelve.

Present—HON. JOHN P. COHALAN, *Surrogate*.

In the Matter

of

*The Accounting of Austin B. Fletcher,
as Testamentary Trustee for Conrad
Morris Braker, under the Last Will
and Testament of Conrad Braker,
Jr., deceased.*

AUSTIN B. FLETCHER, as Testamentary Trustee for Conrad Morris Braker under the 14th clause of the last will and testament of Conrad Braker, Jr., of the City and County of New York, deceased, having heretofore made application to the Surrogate of the County of New York for a judicial settlement of his account as such trustee, and a citation having thereupon been issued, pursuant to statute directed to all persons interested in the estate of said deceased, citing and requiring them and each of them personally to be and appear before the said Surrogate at his office in the

Defendant's Exhibit V

City of New York, on the 14th day of May 1912 at 10:30 o'clock in the forenoon of that day, then and there to attend such judicial settlement, and the said citation having been returned with proof of the due service thereof on Conrad Morris Braker, New York Finance Company, Frank E. Schermerhorn, John A. S. Brown, and Charles Z. Wolff and the said Trustee having appeared on the return day of said citation by William P. S. Melvin, Esq., his attorney, and Conrad Morris Braker having appeared by Safford A. Crumme, Esq., his attorney, and filed an answer claiming the trust fund of \$10,000 held by said trustee, and New York Finance Company and Charles Z. Wolff having respectively filed answers in and by which it is alleged that the New York Finance Company and Charles Z. Wolff have no interest, claim or demand whatever, of any kind or nature, of, in or to the said trust fund, and all other parties cited having made default in appearing or answering, and the said trustee having rendered his account under oath before the said Surrogate, and the said account having been filed, together with the vouchers in support thereof, and the said matter having been adjourned to May 21, 1912 and on that day adjourned to May 28, 1912, on which latter day it was marked for a decree, and the said Surrogate, after having examined the said account and vouchers, now here finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof made by the said Surrogate, as judicially settled and adjusted by him, to be recorded with and taken to be a part of the decree in this matter, to wit:

A. SUMMARY STATEMENT of the account of Austin B. Fletcher as Testamentary Trustee for Conrad Morris Braker under the 14th Clause of the Last Will and

Defendant's Exhibit V

Testament of Conrad Braker, Jr., deceased, made by the Surrogate as judicially settled and allowed.

The said trustee is charged as per account as follows:

To amount of the trust fund created by the 14th Clause of said Will	\$50,000.00
Balance of interest on \$10,000.00 from July 25, 1910 to August 1, 1912	731.37
	<hr/>
	\$50,731.37
Forward	\$50,731.37

The trustee is credited as follows:

With amount of principal paid to Conrad Morris Braker	
On July 21, 1900	\$20,000
On July 21, 1905	20,000
	<hr/>
Leaving a cash balance in his hands of	\$10,731.37

And it appearing that the said trustee has fully accounted for all the moneys and property of the estate of said deceased, which have come into his hands as such Trustee, and his account having been adjusted by the said Surrogate and a summary statement of the same having been made as above and herewith recorded, it is hereby ordered, adjudged and decreed, that the said account be and the same is hereby judicially settled and allowed as filed and adjusted.

And it it further ORDERED, ADJUDGED and DECREED, that out of the balance so found, as above, remaining in the hands of the said trustee he retain the sum of seven hundred and twenty-six and 59/100 dollars (\$726.59) for the commissions to which he is entitled

Defendant's Exhibit V

on this accounting; viz.: \$690 on \$50,000 principal and \$36.59 on \$731.59 income received and paid out, and that he pay over to Conrad Morris Braker the balance, namely, the sum of \$10,004.78, and that upon making such payment the said Austin B. Fletcher be, and he hereby is, discharged from all further liability on account of said trust fund created under the 14th Clause of the last will and testament of Conrad Braker, Jr., deceased, as to all matters embraced in said account.

JOHN P. COHALAN,
(Seal) *Surrogate.*

Original filed Aug. 2, 1912. A true copy.

DANIEL J. DOWDNEY,
Clerk of the Surrogate's Ct.

On behalf of Conrad Morris Braker, I hereby admit notice of settlement of the foregoing decree and consent to the granting and entry of the same this 30th day of July, 1912.

SAFFORD A. CRUMMEY,
Attorney for Conrad Morris Braker.

(Endorsed: "Surrogate's Court, County of New York. In the matter of the accounting of Austin B. Fletcher as trustee, etc. Conrad Braker, Jr., deceased. Copy Decree, Wm. P. S. Melvin, Attorney for trustee, office and P. O. address 165 Broadway, Borough of Manhattan, New York City. U. S. District Ct. Filed Oct. 8, 1912, S. D. of N. Y. E 7-231.")

Complainants' Evidence in Rebuttal.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*John A. S. Brown, a Citizen of the
State of Pennsylvania, and
Frank E. Schermerhorn, as
Trustee for Clara Schermer-
horn, Under the Last Will and
Testament of Thomas Cunning-
ham, Deceased, and a Citizen of
the State of Pennsylvania,*

versus

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Bra-
ker, Under the Last Will and
Testament of Conrad Braker,
Jr., Deceased and a Citizen of
the State of New York.*

Sess. 1911.
No. _____
In Equity.

New York, August 26, 1912, 2 P. M.
Office of William Parkin, Esq., Exam.

TESTIMONY ON THE PART OF COMPLAIN-
ANTS, IN REBUTTAL.

Appearances: MONROE BUCKLEY, representing FRED-
RIC W. FROST, Esq., and CHARLES H.
BURR, Esq., counsel for complain-
ants;

WILLIAM P. S. MELVIN, Esq., attorney
for the defendant.

Counsel for the complainants offers in evidence the
certified copy of the following papers on file in the Mat-
ter of the Accounting of Austin B. Fletcher, as testa-

Complainants' Evidence in Rebuttal.

mentary trustee for Conrad Morris Braker under the last will and testament of Conrad Braker, Jr., deceased, filed in the Surrogates Court of the County of New York, and in the same case on removal to the United States District Court, for the Southern District of New York.

Certified copy of the petition of John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, for removal to the United States District Court for the Southern District of New York, verified May 13, 1912, filed May 14, 1912, in the said Surrogates Court. (Marked Complainants' Exhibit 10.)

Attorney for the defendant objects to the record offered in evidence, that it is immaterial, irrelevant and incompetent and not properly in rebuttal, inasmuch as this cause has been remanded from the District Court to the Surrogates Court.

MR. BUCKLEY: Certified copy of removal bond, executed by John A. S. Brown, and Frank E. Schermerhorn, trustee, &c., as principals, and American Surety Company of New York, as surety, dated May 11, 1912, filed May 14, 1912, in the said Surrogate's Court. (Marked Complainants' Exhibit 11.)

Counsel of defendant objects to the evidence offered in relation to this bond in that it is incompetent and immaterial and irrelevant; that it is a bond that was never acted upon by the Surrogates Court and that the proceeding in which it was sought to use it was remanded by the order of the Federal Court back to the Surrogates Court.

MR. BUCKLEY: Certified copy of the notice of appearance of Fredric W. Frost, Esq., for John A. S.

Complainants' Evidence in Rebuttal.

Brown and Frank E. Schermerhorn, as trustee, &c., filed in the United States District Court for the Southern District of New York, on June 3, 1912. (Marked Complainants' Exhibit 12.)

Counsel for defendant objects to the notice of appearance being received in evidence inasmuch as it is incompetent and irrelevant and immaterial, and that the proceeding in which it was used has been remanded by the Federal Court to the Surrogate's Court, and that it is not properly in rebuttal, and the certificate purports to be made by a clerk who was dead at the time the certificate was made.

MR. BUCKLEY: Certified copy of the affidavit of Fredric W. Frost, verified June 5, 1912, and order to show cause, in re motion to amend bond on removal and vacate default, granted by the Hon. John P. Cohalan, and filed June 5, 1912, in said Surrogate's Court. (Marked Complainants' Exhibit 13.)

Counsel for defendant objects to the notice of appearance being received in evidence, inasmuch as it is incompetent and irrelevant and immaterial, and that the proceeding in which it was used has been remanded by the Federal Court to the Surrogates Court, and that it is not properly in rebuttal.

MR. BUCKLEY: Certified copy of the order of Hon. Robert Ludlow Fowler, permitting the filing of an amended bond on removal, and that upon the filing and approval thereof, the default of the said John A. S. Brown and Frank E. Schermerhorn, as trustee, be vacated, filed June 13, 1912, in said Surrogates Court. (Marked Complainants' Exhibit 14.)

Counsel for defendant objects to the amended bond on removal being received in evidence inasmuch as it is incompetent and irrelevant and immaterial, and that the proceeding in which it was used has been

Complainants' Evidence in Rebuttal.

remanded by the Federal Court to the Surrogates Court, and that it is not properly in rebuttal.

MR. BUCKLEY: Certified copy of amended bond on removal executed by John A. S. Brown and Frank E. Schermerhorn, as trustee, &c., as principals and American Surety Company of New York, as surety, bearing date of June 11, 1912, and the approval thereof by the Hon. Robert Ludlow Fowler, filed in said Surrogates Court, on June 13, 1912. (Marked Complainants' Exhibit 15.)

Counsel for defendant objects to the bond on removal being received in evidence, inasmuch as it is incompetent, immaterial and irrelevant, and that the proceeding in which it was used has been remanded by the Federal Court to the Surrogates Court, and that it is not properly in rebuttal.

MR. BUCKLEY: Certified copy of the affidavit of William P. F. Melvin, Esq., verified July 3, 1912, and notice of motion to remand, filed in the said District Court of the United States for the Southern District of New York. (Marked Complainants' Exhibit 16.)

Counsel for defendant objects to the copy of affidavit of Wm. P. S. Melvin being received in evidence inasmuch as it is incompetent, irrelevant and immaterial, and that the proceeding in which it was used has been remanded by the Federal Court to the Surrogates Court, and that it is not properly in rebuttal, and that the certificate purports to be made by a clerk who was dead at the time the certificate was made, it being admitted that it was certified on or since the fifteenth of August.

MR. BUCKLEY: Certified copy of the answer of John A. S. Brown, and Frank E. Schermerhorn, as trustee, &c., verified July 5, 1912, to the petition of Austin B. Fletcher, as testamentary trustee, &c.,

Complainants' Evidence in Rebuttal.

verified March 15, 1912, said answer having been filed in said District Court on July 6, 1912. (Marked Complainants' Exhibit 17.)

(Objection is repeated.)

MR. BUCKLEY: Certified copy of the order of Hon. E. Lacombe, remanding the said case to the Surrogates Court of the County of New York, signed July 26, 1912, and entered in said District Court on July 27, 1912. (Marked Complainants' Exhibit 18.)

MR. MELVIN: The same objection is repeated with reference to this, as in the first instance.

MR. BUCKLEY: Certified copy of the affidavit of Charles H. Burr, Esq., verified August 6, 1912, and order of the Hon. Henry E. Lacombe, to show cause on September 10, 1912, why a motion for a re-hearing of order of remand should not be granted and staying proceedings in the cause, filed in said District Court. (Marked Complainants' Exhibit 19 & 20.)

MR. MELVIN: The objection is repeated so far as it pertains to this offer of evidence.

MR. BUCKLEY: Certified copy of the affidavit of Charles H. Burr, Esq., verified August 9, 1912, and order of the Hon. John P. Cohalan, signed August 10, 1912, to show cause on September 17, 1912, why the decree of the Surrogates Court entered on August 2, 1912, settling and confirming the accounting of Austin B. Fletcher, as testamentary trustee, &c., and directing distribution by him should not be vacated and staying the said Austin B. Fletcher, as testamentary trustee, &c., from proceeding under said decree of August 2, 1912, filed in the said Surrogates Court. (Marked Complainants' Exhibit 20 & 21.)

MR. MELVIN: The objection is repeated in so far as it pertains to this offer of evidence.

Complainants' Evidence in Rebuttal

It is stipulated and agreed by and between counsel for the respective parties in this action that the documents offered in evidence by counsel for the complainants, at this meeting, for the taking of testimony in this case may be marked as to their numbers by the examiner, at some date to be agreed upon by counsel upon his return from Europe, provided said return takes place before the next term of the court, subject to all of the objections heretofore made by counsel for the defendant, to the relevancy, materiality and competency thereof.

(Complainant's testimony in rebuttal closed.)

Certificate of Standing Examiner

CERTIFICATE OF STANDING EXAMINER.

DISTRICT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

<i>John A. S. Brown and Frank E.</i>	}
<i>Schermerhorn, as Trustee, &c.,</i>	
Complainants,	
against	
<i>Austin B. Fletcher, as Testamen-</i>	}
<i>tary Trustee, &c.,</i>	
Defendant.	

I, William Parkin, a standing examiner, of the United States District Court for the Southern District of New York, do hereby certify that the foregoing testimony in the above-entitled cause was taken by me at the times and places in the record therein indicated, and I was attended by Mr. Charles H. Burr and Mr. Fredric W. Frost for complainant, and Mr. William P. S. Melvin and Mr. S. A. Crummey, for defendant. I further certify that I am not the attorney nor of counsel for any of the parties in the cause, nor interested in the event thereof.

WM. PARKIN,
Examiner.

October 8th, 1912.

Petition of Brown, et al., for Removal

PETITION OF BROWN, ET AL., FOR REMOVAL.

(COMPLAINANTS' EXHIBIT No. 10.)

SURROGATES' COURT OF THE COUNTY OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testa-
mentary Trustee of Conrad Mor-
ris Braker, Under the Last Will
and Testament of Conrad
Braker, Jr., Deceased.*

To the Surrogates' Court of the County of New York:

The petition of John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, respectfully shows to this court:

That your petitioner, John A. S. Brown, now is and was at the time of the commencement of this suit, a citizen of the State of Pennsylvania, and a resident of the city and county of Philadelphia, in said state, and that your petitioner, Frank E. Schermerhorn, is trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, and now is, and was at the time of the commencement of this suit a citizen of the State of Pennsylvania, and a resident of the city and county of Philadelphia, in said state; and that the above-named Austin B. Fletcher is testamentary trustee for Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, and is now, and was at the time of the commencement of this suit, a citizen of the State of New York, and a resident of the city of New York, in said

Petition of Brown, et al., for Removal

State of New York, and that the said Conrad Morris Braker is now, and was at the time of the commencement of this suit, either a citizen of the State of New York, or a citizen of the State of Connecticut.

That the said suit is of a civil nature, and that the said Austin B. Fletcher as testamentary trustee as aforesaid is the sole plaintiff therein.

That on or about the sixteenth day of March, 1912, the said Austin B. Fletcher, testamentary trustee as aforesaid, filed in this Honorable Court his petition, alleging in substance as follows:

That on July 21, 1890, Conrad Braker, Jr., late of the city and county of New York, died, leaving a last will and testament, dated February 20, 1890, which was duly admitted to probate by one of the Surrogates of New York County, on or about September 13, 1890.

That in and by the fourteenth clause of said will the testator devised and bequeathed the sum of \$50,000 to Henry J. Braker to hold the same in trust, and to securely invest the same and to apply the interest or income thereof for the special benefit of his son, Conrad Morris Braker, and to pay over the principal thereof to his said son, as follows: \$20,000 at the expiration of ten years from the death of the said testator; \$20,000 at the expiration of fifteen years from the death of said testator; and \$10,000 at the expiration of twenty years from the death of the testator.

That by an order and decree of the Surrogates' Court, entered the sixteenth day of November, 1897, the said Austin B. Fletcher was appointed testamentary trustee for the said Conrad Morris Braker under the said will of Conrad Braker, Jr., deceased, to succeed the said Henry J. Braker.

That the said Austin B. Fletcher, ten years after the death of Conrad Braker, Jr., namely, on or about July 21, 1900, paid to Conrad Morris

Petition of Brown, et al., for Removal

Braker the sum of \$20,000 out of the said trust fund; and on or about July 21, 1905, paid to Conrad Morris Braker the sum of \$20,000 out of said trust fund, leaving a balance thereof in the said testamentary trustee's hands of \$10,000, the income of which he continued to pay to Conrad Morris Braker up to July 21, 1910, when the said sum of \$10,000 was payable to Conrad Morris Braker under the terms of clause 14 of said will; and that the said sum of \$10,000 still remains in his hands with the interest accumulated thereon from July 21, 1910.

That persons and corporations other than Conrad Morris Braker claim some interest in said fund of \$10,000 remaining in the hands of the said Austin B. Fletcher; claiming under an assignment of the same made by Conrad Morris Braker, namely: Frank L. Rabe, New York Finance Company, which is a corporation organized under the laws of the State of New York, as the said Austin B. Fletcher is informed and believes, John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, and Charles Z. Wolff.

That an action was commenced in the Supreme Court of the State of New York, New York County, on or about February 2, 1911, by Conrad Morris Braker against the said Austin B. Fletcher, trustee as aforesaid, and the New York Finance Company, and Frank L. Rabe; that it was alleged in the complaint that Conrad Morris Braker on or about June 13, 1901, executed to Frank L. Rabe an assignment in and by which he transferred to said Rabe all the interest of said Conrad Morris Braker in said trust fund, subject to two other assignments, as security for a loan for \$2500; that said loan was paid by the payment to the New York Finance Company on July 21, 1905, of the sum of \$7000; that said loan was at a usurious rate, and said Conrad Morris Braker

Petition of Brown, et al., for Removal

asked that the said assignment made by him to the said Rabe and by said Rabe to New York Finance Company, be cancelled, and that the said Austin B. Fletcher be required to pay to said Conrad Morris Braker the balance of said trust fund, namely, \$10,000, with interest from July 21, 1910.

That upon the trial of said action a judgment was entered February 5, 1912, in favor of the plaintiff, and against the said Austin B. Fletcher, ordering and directing the latter to pay to the said Conrad Morris Braker the said sum of \$10,000, with interest; from which said judgment the said Austin B. Fletcher has not appealed, and the time to appeal therefrom has expired; but the New York Finance Company has served notice of appeal.

That on or about October 4, 1911, an action was commenced against the said Austin B. Fletcher, testamentary trustee as aforesaid, in the Circuit Court of the United States, for the Southern District of New York, in which action your petitioners herein are complainants; in which action they asked for a judgment requiring the said Austin B. Fletcher, testamentary trustee as aforesaid, to pay over to them the said sum of \$10,000 of said trust fund remaining in his hands, with interest, claiming under the series of assignments from Conrad Morris Braker through Frank L. Rabe, New York Finance Company, and Charles Z. Wolff to them; that said action is now pending.

That before the twenty-first day of July, 1910, Conrad Morris Braker notified the said Austin B. Fletcher, testamentary trustee aforesaid, in writing, not to pay the said balance of \$10,000 to Frank L. Rabe, or any person or corporation claiming under said assignment from Conrad Morris Braker to said Rabe, dated June 13, 1901.

That the said Austin B. Fletcher, testamentary trustee aforesaid, is desirous of rendering his account to the Surrogate's Court of New York County of his administration of said trust fund

Petition of Brown, et al., for Removal

of \$50,000 and to pay over the balance of \$10,000 with interest now remaining in his hands to whoever is entitled thereto. And praying that:

A citation of this court be issued to all parties who may claim an interest in said trust fund to appear before your Honorable Court at a stated time and to show cause why a decree should not be made settling the account of the said Austin B. Fletcher, as trustee of said trust fund, and determining the rights of the various parties thereto, and discharging the said trustee from all further responsibility and liability on account of said trust.

That with the said petition the said Austin B. Fletcher filed his account of his administration of the said trust fund.

That thereafter, on the said sixteenth day of March, 1912, a citation was issued out of this Honorable Court citing and requiring your petitioners, and Conrad Morris Braker, Frank L. Rabe, New York Finance Company, and Charles Z. Wolff so as aforesaid alleged to be claimants of said trust fund, to be and appear personally before your Honorable Court on the fourteenth day of May, 1912, and then and there attend a judicial settlement of the account of proceedings of the said Austin B. Fletcher as substituted testamentary trustee for Conrad Morris Braker.

That your petitioners deny that persons other than the said Conrad Morris Braker, *cestui que* trust, and your petitioners, claim some interest in the said trust fund, namely, Frank L. Rabe, New York Finance Company, and Charles Z. Wolff, as alleged in paragraph "Seventh" of the said petition of Austin B. Fletcher, testamentary trustee as aforesaid. That on the contrary, your petitioners aver that neither the said Frank L. Rabe, New York Finance Company, and

Petition of Brown, et al., for Removal

Charles Z. Wolff, nor any or either of them, either have or claim to have any interest whatsoever in the said trust fund, and that the said Frank L. Rabe, New York Finance Company, and Charles Z. Wolff are neither proper, indispensable nor necessary parties to this suit; but were simply intermediate assignees who have parted absolutely with their respective interests.

That in so far as the fundamental and primary controversy in this suit is the determination of whether or not the said Austin B. Fletcher, testamentary trustee aforesaid, shall pay over to your petitioners the said \$10,000 now in his hands with interest thereon, such controversy is a separable and distinct controversy between the said Austin B. Fletcher, testamentary trustee as aforesaid, and your petitioners, and that it is a controversy wholly between citizens of different states, to wit, between the said Austin B. Fletcher, testamentary trustee as aforesaid, a citizen of the State of New York, and your petitioners, citizens of the State of Pennsylvania.

That on its face the plaintiff in this suit, Austin B. Fletcher, as trustee, seeks primarily to file his account; but that under the guise of a general prayer that a decree should be made "determining the rights of the various parties among themselves," the said plaintiff is seeking to raise a separate and distinct controversy between your petitioners, citizens of Pennsylvania, and Conrad Morris Braker, a citizen either of Connecticut, or of New York, as to the validity of the deed of assignment to the balance of the said legacy of \$10,000. That in such controversy, if and when it should arise, the plaintiff herein has no interest save as a stakeholder. That in the suit recited in the petition of Austin B. Fletcher, testamentary trustee as aforesaid, brought by the said Conrad Morris Braker to impeach the validity and set aside the said assign-

Petition of Brown, et al., for Removal

ment of the said legacy of \$10,000, your petitioners were not made parties, and the said suit and any judgment entered or to be entered therein cannot affect the interests of your petitioners, and any attempt so to give effect to such judgment constitutes the taking of the property of your petitioners without due process of law contrary to the provisions of the Constitution of the United States.

That a complete determination of said controversy between Conrad Morris Braker and your petitioners can be had without the presence of any of the defendants so cited as aforesaid other than your petitioners; and that all of said other defendants are neither proper, indispensable nor necessary parties to the complete determination of said controversy.

That the foregoing controversy, which is solely between the said Conrad Morris Braker and your petitioners, must be determined if and when it shall arise before any other controversy alleged in said petition of Austin B. Fletcher, testamentary trustee as aforesaid, can be considered and determined; and that said controversy between the said Conrad Morris Braker and your petitioners, as above set forth, is separate and distinct from any other and further controversy.

That said controversy herein between the said Conrad Morris Braker and your petitioners is a controversy wholly between citizens of different states, to wit, between the said Conrad Morris Braker, either a citizen of the State of New York or of Connecticut, and your petitioners, citizens of the State of Pennsylvania.

That the matter in dispute in this action, and in each controversy recited, exceeds the sum of \$3000, exclusive of interest and costs.

Your petitioners further show that this petition is made and filed before your petitioners are required by the laws of the State of New York, or the rule of

Petition of Brown, et al., for Removal

this Honorable Court, to answer or plead to the aforesaid petition of the said Austin B. Fletcher, trustee as aforesaid, and that it is desired by your petitioners to remove said cause from this Honorable Court to the District Court of the United States, for the Southern District of New York in accordance with the provisions of the Acts of Congress of the United States in that behalf made and provided.

Your petitioners offer herewith a good and sufficient surety for their entering in the District Court of the United States, for the Southern District of New York, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said District Court, if said court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioners further pray that the bond filed herewith may be accepted as good and sufficient, and that this Honorable Court will make this order for the removal of this suit into the District Court of the United States, to be held in and for the Southern District of New York, in which district this suit is pending, pursuant to the Act of Congress in such case made and provided, and cause the record herein to be removed into the said District Court of the United States, and that no further or other proceedings may be had in said cause in this court.

And your petitioners will ever pray.

(Signed) JOHN A. S. BROWN,

(Signed) FRANK E. SCHERMERHORN,

As Trustee for Clara Schermerhorn Under the Last Will and Testament of Thomas Cunningham, Deceased.

Petition of Brown, et al., for Removal

CITY AND COUNTY OF PHILADELPHIA, } ss.:
 STATE OF PENNSYLVANIA,

John A. S. Brown, and Frank E. Schermerhorn as trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, being severally sworn, according to law, depose and say: that they are the petitioners named in the foregoing petition; that they have read the foregoing petition, and know the contents thereof, and that the allegations of said petition are true in substance and in fact, except in matters therein stated on information and belief, and as to said matters they believe them to be true.

(Signed)

JOHN A. S. BROWN.

Sworn to and subscribed before me this 13th day of May, A. D. 1912.

(Signed)

FRANK E. SCHERMERHORN,
As Trustee for Clara Schermerhorn, Under the Last Will and Testament of Thomas Cunningham, Deceased.

(Signed)

GEORGE KOPPENHOEFER, JR.,

(Seal)

Notary Public.

My commission expires March 10, 1913.

Petition of Brown, et al., for Removal

(Seal).

Affidavit (Notary).

STATE OF PENNSYLVANIA, }
 COUNTY OF PHILADELPHIA, } ss.:

I, Henry F. Walton, prothonotary of the County of Philadelphia, and clerk of the courts of common pleas of said county, which are courts of record, having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify: That George Koppenhoefer, Jr., Esquire, before whom the annexed affidavit was made, was at the time of so doing a Notary Public for the Commonwealth of Pennsylvania, residing in the County of Philadelphia, duly commissioned and qualified to administer oaths and affirmations, and to take acknowledgements and proofs of deeds or conveyances for lands, tenements, and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this 13th day of May, in the year of our Lord one thousand nine hundred and twelve (1912).

HENRY F. WALTON,
Prothonotary.

Petition of Brown, et al., for Removal

Form 61.

3900-11 (B) 3000.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of said County, do hereby certify that I have compared the foregoing copy of Petition in the matter of the Estate of Conrad Braker, Jr., deceased, with the original record thereof, now remaining in this office and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of the Surrogates' Court of the County of New York this 22d day of August, in the year of our Lord one thousand nine hundred and twelve.

DANIEL J. DOWDNEY,
 (Seal) *Clerk of the Surrogates' Court.*

(Indorsed: "Surrogates' Court of the County of New York. In the Matter of the Accounting of Austin B. Fletcher, as Trustee, etc., of Conrad Braker, Jr., deceased. Petition of John A. S. Brown and Frank E. Schermerhorn, Trustee, etc., for removal to U. S. D. C., S. D. N. Y. Fredric W. Frost, Atty. appearing specially for purposes of removal only, 60 Wall St., New York City. Surrogates' Court, New York Co., May 14, 1912. Filed U. S. District Court. Filed Oct. 8, 1912, S. D. of N. Y. U. S. Dist. Ct., So. Dist. of N. Y. Brown vs. Fletcher, Complots' Exhibit 10, Wm. Parkin, Ex'r.")

Removal Bond

REMOVAL BOND.

(COMPLAINANTS' EXHIBIT, No. 11.)

SURROGATE'S COURT OF THE COUNTY OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testamen-
tary Trustee for Conrad Morris
Braker, Under the Last Will and
Testament of Conrad Braker, Jr.,
Deceased.*

KNOW ALL MEN BY THESE PRESENTS, that JOHN A. S. BROWN, and FRANK E. SCHERMERHORN, as Trustee for Clara E. Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, both of the City and County of Philadelphia, and State of Pennsylvania, as principals, and the AMERICAN SURETY COMPANY OF NEW YORK, a corporation duly organized and existing under the laws of the State of New York having an office at 100 Broadway, in the City of New York, State of New York, as Surety, said corporation being authorized to transact business pursuant to the Act of Congress of August 13th, 1894, entitled "An Act relative to the cognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as Surety therein" are held and firmly bound unto AUSTIN B. FLETCHER, Testamentary Trustee for Conrad Morris Braker, under the last Will and Testament of Conrad Braker, Jr., dec'd., in the sum of Five hundred Dollars (\$500.00) for the payment of which well and truly to be made unto the said Austin B. Fletcher, Testamentary Trustee for Conrad Morris Braker, under the Last Will and Testament of Conrad

Removal Bond

Braker, Jr., deceased, his heirs, successors, executors and assigns, the said Principals and Surety bind themselves, their and each of their heirs, successors, executors and assigns, jointly and firmly by these presents, upon the condition nevertheless that

WHEREAS, the above-named Austin B. Fletcher, as Testamentary Trustee for Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, has heretofore brought a suit of a civil nature in the Surrogate's Court of the County of New York, in the State of New York, against the said John A. S. Brown, and Frank E. Schermerhorn, Trustee as aforesaid, and others, and

WHEREAS, the said John A. S. Brown, and Frank E. Schermerhorn, Trustee, as aforesaid, simultaneously with the filing of this bond, intend to file their petition in the said suit in such State Court for the removal of such suit into the District Court of the United States, for the Southern District of New York, according to the provisions of the Act of Congress in such cases made and provided.

Now, THEREFORE, the condition of this obligation is such that if the said petitioners, John A. S. Brown, Frank E. Schermerhorn, Trustee as aforesaid, shall enter in the District Court of the United States, in and for the Southern District of New York on the first day of its next session a copy of the Record in such suit and shall well and truly pay all costs that may be awarded by the said District Court, if said Court shall hold that such suit was wrongfully or improperly removed there-to, and shall also appear and enter special bail in such suit, if special bail was originally requisite therein, then the above obligation shall be void, but otherwise remain in full force and virtue.

Removal Bond

IN WITNESS WHEREOF, the said John A. S. Brown, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, have hereunto set their hands and seals and the said AMERICAN SURETY COMPANY OF NEW YORK, has caused these presents to be signed by its Res. Vice Pres. and attested by its Res. Asst. Secy. and its corporate seal to be hereunto affixed, this done the 14th day of May, A. D., 1912.

JOHN A. S. BROWN,
FRANK E. SCHERMERHORN,
As Trustee for Clara Schermerhorn, Under the Last Will and Testament of Thomas Cunningham, dec'd.

In the presence of:

MONROE BUCKLEY,
328 Chestnut St.,
Philadelphia, Pa., as to
Messrs. Brown and Schermerhorn.

AMERICAN SURETY COMPANY OF NEW YORK,

By
By HORACE P. HOLLISTER,
Res. Vice-President.

Attest:

M. W. DIVINE,
Res. Assist. Secretary.

Removal Bond

Form 61.

3900-11 (B) 3000.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of said County, do hereby certify that I have compared the foregoing copy of Bond in the matter of the Estate of Conrad Braker, Jr., deceased, with the original record thereof, now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of the Surrogates' Court of the County of New York, this 22d day of August, in the year of our Lord, one thousand nine hundred and twelve.

DANIEL J. DOWDNEY,
 (Seal) *Clerk of the Surrogates' Court.*

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

On the 14th day of May, 1912, before me personally appeared Horace P. Hollister, Resident Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resides in Mt. Vernon, N. Y.; that he is the Resident Vice-President of the American Surety Company of New York, the corporation described in, and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation, and that he signed his name

Removal Bond

thereto by like order, and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said Horace P. Hollister further said that he is acquainted with M. W. Divine and knows him to be one of the resident assistant secretaries of said corporation; that the signature of said M. W. Divine subscribed to the said instrument is in the genuine handwriting of the said M. W. Divine and was thereto subscribed by the like order of the said Board of Trustees and in the presence of him, the said Horace P. Hollister, Resident Vice-President.

E. A. FARRELL, (L. S.)
*Notary Public, New York County,
No. 7 Register's Office, N. Y.
Co. No. 3002. Certificate filed
in All Counties.*

(Indorsed: "Surrogates' Court, New York County.

In the matter of the Accounting of Austin B. Fletcher, as Testamentary Trustee, etc., under the last will and testament of Conrad Braker, Jr., deceased. Bond on removal to U. S. District Court. Fredric W. Frost, appearing specially for purposes of removal, 60 Wall St., Borough of Manhattan, New York City. Filed May 14, 1912. U. S. District Court. Filed Oct. 8, 1912. S. D. of N. Y. E. 7-231. U. S. Dist. Ct. So. Dist. of N. Y. Brown vs. Fletcher, Compls. Exhibit 11, Wm. Parkin, Ex'r.")

Complainants' Exhibit No. 12

COMPLAINANTS' EXHIBIT NO. 12.

DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testamen-
tary Trustee for Conrad Morris
Braker, Under the Last Will and
Testament of Conrad Braker,
Jr., Deceased.*

*To the Clerk of the District Court,
for the Southern District of New York:*

Please enter the appearance of John A. S. Brown and Frank E. Schermerhorn, the defendants in the above entitled cause, removed from the Surrogates' Court of the County of New York, to the District Court of the United States, Southern District of New York, and of myself as solicitor as of the date of filing hereof.

FREDRIC W. FROST,
Solicitor.

Dated New York, June 3, 1912.

U. S. District Court,
S. D. of N. Y.

Filed Jun. 3, 1912.

A copy.

THOMAS ALEXANDER,
(Seal) *Clerk.*

(Endorsed: "U. S. District Court, Southern District of N. Y. In the matter of the accounting of Austin B. Fletcher as testamentary trustee, etc. Appearance, Law 9-152. U. S. District Court, June 3, 1912. M. S. D. of N. Y. Fredric W. Frost, att'y, 60 Wall St., New York City. U. S. District Court. Filed Oct. 8, 1912, S. D. of N. Y. Eq. 7-231, U. S. Dist. Ct. So. Dist. of N. Y. Brown vs. Fletcher, Complainants' Exhibit 12, Wm. Parkin, Ex'r.")

Affidavit and Order to Show Cause

AFFIDAVIT AND ORDER TO SHOW CAUSE.

(COMPLAINANTS' EXHIBIT, No. 13.)

At chambers of the Surrogates' Court held in and for the county of New York, at the Surrogates' office in the county of New York, on the fifth day of June, in the year one thousand nine hundred and twelve.

Present: Honorable JOHN P. COHALAN, Surrogate.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testamen-
tary Trustee for Conrad Morris
Braker, Under the Last Will and
Testament of Conrad Braker, Jr.,
Deceased.*

Upon the verified petition of John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, for removal of this cause to the District Court of the United States for the Southern District of New York, and upon the bond on removal, both of which are filed in the clerk's office of the Surrogates' of the County of New York and upon all the other papers filed in this proceeding and on reading the affidavit of Fredric W. Frost, verified the fifth day of June, 1912.

Let Austin B. Fletcher as testamentary trustee for Conrad Morris Braker under the last will and testament of Conrad Braker, Jr., deceased, show cause before me in the Surrogates' Court in and for the county of New York, at the Hall of Records, in the city

Affidavit and Order to Show Cause

of New York, on the seventh day of June, 1912, at 10/2 o'clock in the—noon of that day or as soon thereafter as counsel can be heard why said John A. S. Brown and Frank E. Schermerhorn, as trustee, etc., should not be permitted to amend the bond on removal heretofore filed herein to comply with the Judicial Code, which went into effect January 1, 1912, and in case of such amendment of the bond why the default of said John A. S. Brown and Frank E. Schermerhorn, as trustee, etc., in these proceedings, if any there be, should not be vacated or why such further order or relief should not be granted as the court may deem proper.

Service of a copy of this order and the affidavit upon which it is granted upon Austin B. Fletcher or his counsel on or before the sixth day of June, 1912, shall be sufficient.

JOHN P. COHALAN,
Surrogate.

SURROGATES' COURT OF THE COUNTY OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testamentary
Trustee for Conrad Morris
Braker, Under the Last Will and
Testament of Conrad Braker, Jr.,
Deceased.*

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

Fredric W. Frost, being duly sworn, deposes and says, that he is the attorney for John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn under the last will and testament of Thomas

Affidavit and Order to Show Cause

Cunningham, deceased, who are cited in the above entitled matter as defendants. That said John A. S. Brown and Frank E. Schermerhorn, both reside in Philadelphia, Pa. That upon the fourteenth day of May, 1912, the return day of said citation deponent appearing specially for the purpose of removal only filed a petition and bond for removal of said cause to the United States District Court for the Southern District of New York on the grounds of diverse citizenship and a separable controversy as to said John A. S. Brown and Frank E. Schermerhorn, as trustee, etc., which petition and bond on removal are on file in the clerk's office of the Surrogates' of the county of New York. That on said return day William P. S. Melvin, Esq., appearing for the petitioner herein asked for an adjournment of one week; that upon the said twenty-first day of May, 1912, this deponent wholly through inadvertence failed to attend in the Surrogates' Court. That upon the same day and immediately thereafter deponent called up said William P. S. Melvin on the telephone and asked him what disposition had been made of the matter and deponent was informed by said William P. S. Melvin that the court had taken the matter under advisement, but said William P. S. Melvin wholly failed to state to deponent that the matter had been adjourned for another week and deponent had no knowledge of said fact until he called upon said Melvin upon the first day of June, 1912, and asked him for a copy of the petition on accounting for the purpose of completing deponent's papers for removing the record to the United States District Court. That deponent was then informed that the case had been adjourned from the twenty-first day of May to the twenty-eighth day of May and that upon said last adjourned day his Honor the Surrogate had from the bench stated in open

Affidavit and Order to Show Cause

court that the petition for removal was denied on the ground that the bond on removal was defective in form.

That deponent tried to see his Honor the Surrogate on the same day to learn what disposition had been made of the matter, but was unable to see him as deponent did not learn from Mr. Melvin of the disposition of the case until late Saturday morning which was a short day. That deponent then completed the certification of the record and filed the same in the United States District Court and served a notice of filing the same on the third day of June, 1912, upon said William P. S. Melvin. That this was done in order to remove the record to the United States District Court within the time mentioned by the Federal statute.

That upon the fourth day of June, 1912, deponent had an interview with his Honor the Surrogate at the Surrogate's Chambers and then learned for the first time that the defect in the bond was a technical defect in that it did not comply with the new Judiciary Act, but rather complied with the old act.

That as the bond was filed on the return day of the citation and as the defect is merely a technical defect, deponent submits that an opportunity should be given to correct said bond and remedy said defect, so that these defendants should have an opportunity to have the issues herein tried out in the Federal Court which right is granted to them under section 28 of the New Judicial Code.

That their right to have the cause tried in the Federal Court seems to have been established by the fact that a suit had previously thereto and on the fourteenth day of October, 1911, been filed in the Circuit Court of the United States in which said John A. S. Brown and Frank E. Schermerhorn, as trustees, etc., are complainants and Austin B. Fletcher, as trustee,

Affidavit and Order to Show Cause

etc., the accounting party herein was defendant, which suit involved the same issues as are here involved, so far as they relate to John A. S. Brown and Frank E. Schermerhorn, as trustee. That a demurrer was interposed on behalf of the defendant in that case and the demurrer was overruled with costs. That a motion was made for a stay of said cause pending the trying out of a case in the New York Supreme Court, New York County, between Conrad Morris Braker as plaintiff and others as defendants, but in which latter suit said Brown and Schermerhorn were not parties and that said stay of said trial in the Federal Court was denied. That thereupon this accounting proceeding was brought in the Surrogates' Court which involves exactly the same issues and the said Brown and Schermerhorn were cited.

The Federal Court by Judge Hand has held that it has jurisdiction in this matter.

That under the new Judiciary Act deponent has until the thirteenth day of June, 1912, in which to file the record in the United States District Court and deponent submits that an opportunity should be given to correct the bond before said time to file the record expires. Deponent further states that because of the fact that the bond has been held technically defective, said John A. S. Brown and Frank E. Schermerhorn, as trustee, etc., are technically in default on the accounting proceedings, as the appearance by deponent was only special and for the purpose of removal only. As deponent would not have sufficient time to give notice and get the bond corrected before the thirteenth day of June, 1912, the date on which the record should be filed finally in the Federal Court in its correct form, deponent requests that an order to show cause be granted why said John A. S. Brown and Frank E.

Affidavit and Order to Show Cause

Schermerhorn, as trustee, etc., should not be permitted to correct the technical defect in the bond on removal heretofore filed herein; and also should not be allowed to open the technical default caused by the defect in said bond so previously filed.

That no other or previous application for this order has been made to this or any other court.

Sworn to before me this 5th day of June, 1912. } FREDRIC W. FROST.

ELGIN E. RUDD,
Notary Public, No. 3166.
N. Y. Co.

Form 61.

3900-11 (B) 3000.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of said County, do hereby certify that I have compared the foregoing copy of Order and Affidavit in the matter of the Estate of Conrad Braker, Jr., deceased with the original record thereof, now remaining in this office and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of the Surrogates' Court of the County of New York this 22d day of August, in the year of our Lord, one thousand nine hundred and twelve.

DANIEL J. DOWDNEY,
(Seal) Clerk of the Surrogates' Court.

Affidavit and Order to Show Cause

(Indorsed: "Surrogates' Court of N. Y. County. In the matter of the accounting of Austin B. Fletcher, as Trustee, etc., under the last will and testament of Conrad Braker, Jr., deceased. Affidavit and Order to show cause. Motion to amend bond on removal and vacate default granted. Copy served June 6, 1912. Wm. P. S. Melvin, Atty. for Trustee. Fredric W. Frost, Atty., 60 Wall St., New York City. Filed June 6, 1912. U. S. District Court. Filed Oct. 8, 1912. S. D. of N. Y. U. S. District Ct. So. Dist. of N. Y. Brown vs. Fletcher, Complots.' Exhibit 13, Wm. Parkin, Ex'r.")

Order Permitting Filing of Amended Bond
ORDER PERMITTING FILING OF AMENDED
BOND.

(COMPLAINANTS' EXHIBIT, No. 14.)

At chambers of the Surrogates' Court held in and
for the county of New York, at the Surro-
gate's Office in the county of New York, on
the twelfth day of June, 1912.

Present: ROBERT LUDLOW FOWLER, Surrogate.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testamen-
tary Trustee for Conrad Morris
Braker, Under the Last Will and
Testament of Conrad Braker, Jr.,
Deceased.*

On reading and filing the order to show cause
granted herein by Honorable John P. Cohalan, Surro-
gate, on the fifth day of June, 1912, and the affidavit of
Fredric W. Frost, verified the fifth day of June, 1912,
thereto annexed, and on motion of Fredric W. Frost,
Attorney,

It is ordered that the said John A. S. Brown and
Frank E. Schermerhorn, as trustee, etc., shall be and
they are hereby permitted to file a bond amending the
bond on removal from the Surrogates' Court to the
United States District Court for the Southern Dis-
trict of New York, filed herein on the fourteenth day
of May, 1912, in the Surrogates' Court of the County
of New York, to make the same comply with the Judi-
cial Code which went into effect January 1, 1912, and

Order Permitting Filing of Amended Bond

upon filing of such bond and the approval thereof in due form by this court, the default herein of said John A. S. Brown and Frank E. Schermerhorn, as trustee, etc., shall be and is hereby vacated.

ROBERT LUDLOW FOWLER,
Surrogate.

Original filed June 13, 1912.

A true copy.

DANIEL J. DOWDNEY,
(Seal) *Clerk of the Surrogates' Court.*

(Indorsed: "Surrogates' Court, New York County.

In the matter of the accounting of Austin B. Fletcher, as testamentary trustee, etc., under the last will and testament of Conrad Braker, deceased. Order allowing amended bond to be filed. Fredric W. Frost, Atty., 60 Wall Street, New York City. Surrogates' Court, N. Y. County. Filed June 13, 1912. U. S. District Court. Filed Oct. 8, 1912, S. D. of N. Y. Eq. 7-231. U. S. Dist. Ct., So. Dist. of N. Y. Brown vs. Fletcher, Compls.' Exhibit 14, Wm. P. kin, Ex'r.")

Amended Bond

AMENDED BOND.

(COMPLAINANTS' EXHIBIT, No. 15.)

SURROGATES' COURT OF THE COUNTY OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testamen-
tary Trustee for Conrad Morris
Braker, Under the Last Will and
Testament of Conrad Braker, Jr.,
Deceased.*

KNOW ALL MEN BY THESE PRESENTS, that JOHN A. S. BROWN, and FRANK E. SCHERMERHORN as Trustee for Clara E. Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, both of the City and County of Philadelphia, and State of Pennsylvania, as Principals, and the AMERICAN SURETY COMPANY OF NEW YORK, a corporation duly organized and existing under the laws of the State of New York, having an Office at 100 Broadway, in the City of New York, State of New York, as Surety, said corporation being authorized to transact business pursuant to the Act of Congress of August 13th, 1894, entitled "An Act relative to the cognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as Surety therein", are held and firmly bound unto Austin B. Fletcher, as Testamentary Trustee for Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, in the sum of FIVE HUNDRED DOLLARS (\$500) for the payment of which well and truly to be made unto the said Austin B. Fletcher, as Testamentary Trustee for Conrad Morris Braker, under the Last Will and Testa-

Amended Bond

ment of Conrad Braker, Jr., deceased, his heirs, successors, executors and assigns, the said Principals and Surety bind themselves, their and each of their heirs, successors, executors and assigns jointly and firmly by these presents, upon the condition nevertheless that

WHEREAS, the above-named Austin B. Fletcher, as under the Last Will and Testament of Conrad Braker, Testamentary Trustee for Conrad Morris Braker, Jr., deceased, has heretofore brought a suit of a civil nature in the Surrogates' Court of the County of New York, in the State of New York, against the said John A. S. Brown, and Frank E. Schermerhorn, Trustee as aforesaid, and others; and

WHEREAS, the said John A. S. Brown, and Frank E. Schermerhorn, Trustee as aforesaid, simultaneously with the filing of this Bond, intend to file their petition in the said suit in such State Court for the removal of such suit into the District Court of the United States, for the Southern District of New York, according to the provisions of the Act of Congress in such cases made and provided.

Now, THEREFORE, the condition of this obligation is such that if the said petitioners John A. S. Brown, and Frank E. Schermerhorn, Trustee as aforesaid, shall enter in the District Court of the United States, in and for the Southern District of New York within Thirty (30) days from the date of filing of said petition, a certified copy of the Record in such suit and shall well and truly pay all costs that may be awarded by the said District Court, in said District Court shall hold that such suit was wrongfully or improperly removed thereto, and shall also appear and enter special bail in such suit, if special bail was originally requisite therein, then the above obligation shall be void, but shall otherwise remain in full force and virtue.

Amended Bond

IN WITNESS WHEREOF, the said JOHN A. S. BROWN, and FRANK E. SCHERMERHORN, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, have hereunto set their hands and seals, and the said AMERICAN SURETY COMPANY OF NEW YORK, has caused these presents to be signed by its Resident Vice President, and attested by its Resident Assistant Secretary, and its corporate seal to be hereunto affixed, this done the 11th day of June, A. D., 1912.

(Signed)

JOHN A. S. BROWN.

(L. S.)

(Signed)

FRANK E. SCHERMERHORN, (L. S.)

As Trustee for Clara Schermerhorn, Under the Last Will and Testament of Thomas Cunningham, Dec'd.

In the presence of:

(Signed)

GEORGE KOPPENHOEFER, JR.,
RAYMOND C. KARGE.

As to

JNO. A. S. BROWN,
FRANK E. SCHERMERHORN.

AMERICAN SURETY COMPANY OF
NEW YORK (L. S.),

By HORACE P. HOLLESTER,
Resident Vice-President.

Attest:

By M. W. DIVINE (L. S.),
Resident Assistant Secretary.

Amended Bond

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On the 11th day of June, 1912, before me personally appeared Horace P. Hollister, Resident Vice-President of the American Surety Company of New York, to me known, who being by me duly sworn, did depose and say that he resides in Mt. Vernon, New York; that he is the Resident Vice-President of the American Surety Company of New York, the corporation described in, and which executed the above instrument; that he knows the corporate seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Trustees of said corporation, and that he signed his name thereto by like order, and that the liabilities of said corporation do not exceed its assets as ascertained in the manner provided by law. And the said Horace P. Hollister further said that he is acquainted with M. W. Divine and knows him to be one of the resident assistant secretaries of said corporation; that the signature of said M. W. Divine subscribed to the said instrument is in the genuine handwriting of the said M. W. Divine and was thereto subscribed by the like order of the said Board of Trustees and in the presence of him, the said Horace P. Hollister, Resident Vice-President.

E. A. FARRELL, (L. S.)
*Notary Public, New York County,
No. 7 Register's Office, N. Y.
Co. No. 3002. Certificate Filed
in All Counties.*

Amended Bond

Form 61.

3900-11 (B) 3000.

STATE OF NEW YORK, }
 COUNTY OF NEW YORK, } ss.:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of said County, do hereby certify that I have compared the foregoing copy of amended bond in the matter of the Estate of Conrad Braker, Jr., deceased, with the original record thereof, now remaining in this office and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of the Surrogates' Court of the County of New York this 22d day of August, in the year of our Lord, one thousand nine hundred and twelve.

DANIEL J. DOWDNEY,
 (Seal) *Clerk of the Surrogates' Court.*

(Indorsed: "Surrogates' Court, New York County. In the matter of the accounting of Austin B. Fletcher, as testamentary trustee, etc., under the last will and testament of Conrad Braker, Jr., deceased. Amended Bond. Fredric W. Frost, attorney for defendants Brown and Schermerhorn, 60 Wall Street, Borough of Manhattan, New York City. Petition received and within bond approved. Robt. Ludlow Fowler, Surrogate. Surrogates' Court, N. Y. County. Filed June 13, 1912. U. S. District Court. Filed Oct. 8, 1912. S. D. of N. Y. Brown vs. Fletcher. Compls. Exhibit 15. Wm. Parkin, Ex'r.'")

Affidavit and Notice of Motion

AFFIDAVIT AND NOTICE OF MOTION.

(COMPLAINANTS' EXHIBIT, No. 16.)

DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testa-
mentary Trustee for Conrad
Morris Braker, Under the Last
Will and Testament of Conrad
Braker, Jr., Deceased.*

Sir:

You will please take notice that, upon the affidavit of William P. S. Melvin, verified July 3, 1912, a copy of which is herewith served upon you, and upon the record herein of the proceedings in the Surrogates' Court of the County of New York, State of New York, filed and entered in this District Court on the third day of June, 1912, on behalf of the defendants, John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, and of the general appearance then entered in this cause for the said defendants and upon the notice of the removal of the cause from the said Surrogates' Court to this District Court (Exhibit A, attached to said affidavit) served herein upon the attorney for said Austin B. Fletcher, on the third day of June, 1912, and also upon the order to show cause subsequently made herein in the said Surrogates' Court, and the order entered thereon assuming to amend the bond on removal, as

Affidavit and Notice of Motion

well upon such alleged amended bond,—all of which papers subsequently made were filed in this District Court on the twelfth day of June, 1912,—a motion will be made, on the part of said Austin B. Fletcher, as testamentary trustee, etc., at a stated term of this court for the hearing of motions, to be held at Room No. 66, or such other room as the court may direct, at the Post-Office Building, in the city of New York, on the ninth day of July, 1912, at 10.30 o'clock A. M., or as soon thereafter as counsel may be heard, for an order that this cause was improperly and wrongfully removed to this court, for insufficient cause; and that the bond and the amended bond were insufficient; and that the cause be remanded to the Surrogates' Court in the County of New York, or for such other rule or order in the premises as may be just.

Dated, July 3, 1912.

Yours, etc.,

WM. P. S. MELVIN,
Atty. for A. B. Fletcher,
Trustee, etc.,

165 Broadway,
New York City, N. Y.

To FREDRIC W. FROST, Esq.,
Attorney for John A. S. Brown,
and Frank E. Schermerhorn, as Trustee

Affidavit and Notice of Motion

DISTRICT COURT OF THE UNITED STATES FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testa-
mentary Trustee for Conrad
Morris Braker, Under the Last
Will and Testament of Conrad
Braker, Jr., Deceased.*

COUNTY OF NEW YORK, ss.:

William P. S. Melvin, being duly sworn, says that he is the attorney in this proceeding for Austin B. Fletcher, the testamentary trustee. That the same was instituted in the Surrogates' Court for the County of New York, and the citation therein was returnable at the Surrogates' Court on the fourteenth day of May, 1912, at 10.30 o'clock A. M. That upon the cause being regularly called on the return day, John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, specially appeared and filed their petition and bond, for the purpose of the removal of the case to this United States District Court. That thereupon, on the motion of deponent the proceeding was adjourned to the twenty-first day of May, 1912, so as that deponent might have an opportunity of inspecting the removal papers. That on the adjourned day deponent appeared in court and objected that the grounds stated in said petition for removal were insufficient, and that the petition showed on its face that the petitioners were endeavoring, by alleging that there is a controversy between themselves and a citizen of the State of New York, separable and distinct in its character, to remove to

Affidavit and Notice of Motion

this district court a suit, which, as they themselves set forth is to recover upon a chose in action in favor of an assignee; and this court has not cognizance of such a suit, unless it would have cognizance of it, were no assignment to have been made.

That deponent further objected that the bond did not conform with the requirements of the law, inasmuch as it did not provide for the said parties Brown and Schermerhorn entering in said district court within thirty days from the date of the filing of said petition a certified copy of the record in such suit.

Deponent further says that the presiding Surrogate thereupon declared that he wished to inspect such removal papers; and thereupon, of his own volition, postponed the matter to the twenty-eighth day of May, 1912. That, on the twenty-eighth day of May, 1912, said Surrogate announced from the bench that the bond proposed for the removal was fatally defective and declined to order the removal of the matter.

That afterwards, on the third day of June, 1912, deponent was served with a notice (a copy of which is hereto annexed, marked Exhibit A) advising deponent that Fredric W. Frost, Esq., had on that day filed and entered in this District Court a copy of the record in said Surrogates' Court, and had duly entered his general appearance in the cause in said District Court for the defendants John A. S. Brown and Frank E. Schermerhorn, as trustee, etc.,

That afterwards, on the sixth day of June, 1912, deponent was served with an affidavit and an order that the petitioner in this cause, Austin B. Fletcher, show cause before Hon. John P. Cohalan, one of the Surrogates of the County of New York on June 7, 1912, why said Brown and Schermer-

Affidavit and Notice of Motion

horn should not be permitted to amend the said bond on removal to comply with the Judicial Code, and why the default of said Brown and Schermerhorn, "if any there be" should not be vacated.

That afterwards, on the return day of said order to show cause, deponent appeared, and the hearing upon the order to show cause was remitted by Hon. Surrogate Cohalan to Hon. Surrogate Fowler, before whom the proceedings were originally returnable, and who had already passed upon the question as to the sufficiency of the bond; and the hearing upon the order to show cause came before the latter Surrogate on the twelfth day of June, 1912.

That deponent then appeared and objected that the court had lost jurisdiction of the cause and could not amend the bond in a material matter; but his objections were overruled, and the Surrogate made the order, a copy of which is hereto annexed, marked Exhibit B, — and on the same day deponent received the notice informing him of the filing of such supplemental papers, a copy of which is hereto annexed, marked Exhibit C.

Deponent further says that Conrad Morris Braker, one of the defendants cited in said Surrogates' Court, is a citizen of the State of New York and was such at the time of the commencement of this proceeding.

Sworn to 3rd day }
of July, 1912.

WILLIAM P. S. MELVIN.

JOHN G. DANIEL,

Notary Public, Kings County,

No. 155. Certificate Filed New York County. No. 71. Kings County Register, No. 4783. New York County Register, No. 3185. Commission expires March 30, 1913.

*Affidavit and Notice of Motion***EXHIBIT A.**

DISTRICT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testa-
ris Braker, Under the Last Will
and Testament of Conrad
mentary Trustee of Conrad Mor-
Braker, Jr., Deceased.*

Sir:

Please take notice that on the fourteenth day of May, 1912, upon the filing the petition and bond on removal, copies of which were served on you on that day, in the office of the clerk of the Surrogates' Court of the County of New York, as required by law, this cause was duly removed from the Surrogates' Court of the County of New York, State of New York, into the District Court of the United States for the Southern District of New York, and that I have this day filed and entered in the said District Court of the United States a copy of the record in said Surrogates' Court, and also copies of all processes, pleadings, depositions, testimony and other proceedings therein, and that I duly entered my general appearance in this cause for the defendants John A. S. Brown, and Frank E. Schermerhorn.

Dated, New York, June 3, 1912.

Yours, etc.,

FREDRIC W. FROST,

*Attorney for J. A. S. Brown
and F. E. Schermerhorn,
60 Wall Street, New York
City, Borough of Manhat-
tan, New York City.*

TO WM. P. S. MELVIN,

*Attorney for A. B. Fletcher, etc.,
165 Broadway.*

Affidavit and Notice of Motion

EXHIBIT B.

DISTRICT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testa-
mentary Trustee for Conrad
Morris Braker, Under the Last
Will and Testament of Conrad
Braker, Jr., Deceased.*

At chambers of the Surrogate's Court, held in and
for the county of New York at the Surro-
gate's Office in the county of New York, on the
twelfth day of June, 1912.

Present: ROBERT LUDLOW FOWLER.

On reading and filing the order to show cause
granted herein by Honorable John P. Cohalan, Sur-
rogate, on the fifth day of June, 1912, and the affidavit
of Fredric W. Frost, verified on the fifth day of June,
1912, thereto annexed, and on motion of Fredric W.
Frost, attorney,

It is ordered that the said John A. S. Brown and
Frank E. Schermerhorn, as trustees, etc., shall be
and they are hereby permitted to file a bond amending
the bond on removal from the Surrogates' Court to
the United States District Court for the Southern
District of New York, filed herein on the fourteenth
day of May, 1912, in the Surrogates' Court of the

Affidavit and Notice of Motion

County of New York, to make the same comply with the Judicial Code which went into effect January 1, 1912; and upon filing such bond and the approval thereof in due form by this court, the default herein of said John A. S. Brown and Frank E. Schermerhorn, as trustee, etc., shall be and is hereby vacated.

ROBERT LUDLOW FOWLER,
Surrogate.

EXHIBIT C.

DISTRICT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testa-
mentary Trustee for Conrad
Morris Braker, Under the Last
Will and Testament of Conrad
Braker, Jr., Deceased.*

Sir:

Please take notice that I have, this day, duly filed and entered in the District Court of the United States a certified copy of the order to show cause, a copy of which was served on you the sixth day of June, 1912; a certified copy of the order entered thereon, a copy of which is served on you herewith, and a certified copy of the amended bond on removal, a copy of which is served on you herewith, all of which are part of the removal papers of the above cause from the Sur-

Affidavit and Notice of Motion

rogates' Court of the County of New York to the United States District Court for the Southern District of New York, which papers were filed in the United States District Court on the third day of June, 1912.
Dated, New York, June 12, 1912.

Yours, etc.,

FREDRIC W. FROST,
*Attorney for John A. S. Brown
and Frank E. Schermerhorn,
60 Wall Street, Borough of
Manhattan, New York City.*

To WILLIAM P. S. MELVIN,
*Attorney for A. B. Fletcher, etc.,
165 Broadway.*

A Copy.

THOMAS ALEXANDER,
(Seal) *Clerk.*

(Indorsed: "United States District Court, Southern District of New York. In the matter of the Accounting of Austin B. Fletcher, as Testamentary Trustee, etc. Affidavit and Notice of Motion to Remand. William P. S. Melvin, Attorney for Austin B. Fletcher, as Trustee, etc., 165 Broadway, New York City. To Fredric W. Frost, Esq., Attorney for Brown and Schermerhorn. Adm. July 3, 1912. U. S. District Court. Filed Oct. 8, 1912, S. D. of N. Y. Eq. 7-231. U. S. Dist. Ct., So. Dist. of N. Y. Brown vs. Fletcher, Compls.' Exhibit 16, Wm. Parkin, Ex's.")

Answer of Brown, et al.

ANSWER OF BROWN, ET AL.

(COMPLAINANTS' EXHIBIT, No. 17.)

DISTRICT COURT OF THE UNITED STATES, FOR THE
SOUTHERN DISTRICT OF NEW YORK.

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris
Braker, Under the Last Will and
Testament of Conrad Braker,
Jr., Deceased,*

vs.

*John A. S. Brown and Frank E.
Schermernhorn, as Trustee for
Clara Schermernhorn, Under the
Last Will and Testament of
Thomas Cunningham, Deceased,
et als.*

ANSWER OF JOHN A. S. BROWN AND FRANK E. SCHERMERNHORN, AS TRUSTEE, ETC., TO THE PETITION OF AUSTIN B. FLETCHER, TESTAMENTARY TRUSTEE, ETC.

These defendants, John A. S. Brown and Frank E. Schermernhorn, as trustee for Clara Schermernhorn, under the last will and testament of Thomas Cunningham, deceased, saving and reserving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said petition contained, for answer thereto, or to so much thereof as these defendants are advised it is material

Answer of Brown, et al.

or necessary for them to make answer unto, answering say:

First.—These defendants admit the allegations contained in paragraph one of the said petition.

Second.—These defendants admit the allegations contained in paragraph two of the said petition.

Third.—These defendants admit the allegations contained in paragraph three of the said petition.

Fourth.—These defendants admit the allegations contained in paragraph four of the said petition.

Fifth.—These defendants admit the allegations contained in paragraph five of the said petition.

Sixth.—These defendants are advised that they need not answer the averments in the sixth paragraph of the said petition.

Seventh.—In answer to the averments contained in the seventh paragraph of the said petition, defendants aver that they do claim ownership of the said fund of ten thousand dollars (\$10,000) under an assignment of the same made by Conrad Morris Braker, but they further aver that neither Frank L. Rabe, nor the New York Finance Company have any claim, nor have made any claim to said fund.

Eighth.—Defendants are advised that they need not answer the averments contained in the eighth and ninth paragraphs of the said petition, except to say that the said action in the Supreme Court of the State of New York therein said to be pending, is wholly irrelevant in this cause, because, defendants are not, and have not, been made parties thereto.

Answer of Brown, et al.

Ninth.—These defendants admit the allegations contained in paragraph ten of the said petition.

Tenth.—These defendants have no knowledge as to the truth of the averment contained in the eleventh paragraph of said petition, but are advised that the same is wholly immaterial.

Eleventh.—These defendants are advised that they need not answer the twelfth paragraph of the said petition.

Twelfth.—These defendants have no knowledge as to the citizenship of the several parties named in the thirteenth paragraph of the said petition, except that they admit that these defendants are residents of the city of Philadelphia, and citizens of the State of Pennsylvania.

Thirteenth.—These defendants further answering the said petition, and particularly answering the prayer of the said petition, deny that persons other than the said Conrad Morris Braker, cestui que trust, and these defendants claim some interest in the said trust fund, namely, Frank L. Rabe, New York Finance Company, and Charles Z. Wolff, as alleged in paragraph seven of the said petition of Austin B. Fletcher, testamentary trustee as aforesaid. That on the contrary, these defendants aver that neither the said Frank L. Rabe, New York Finance Company, and Charles Z. Wolff, nor any or either of them, either have or claim to have any interest whatsoever in the said trust fund, and that the said Frank L. Rabe, New York Finance Company, and Charles Z. Wolff are neither proper, indispensable nor necessary parties to this suit; but were simply intermediate assignees who have parted absolutely with their respective interests.

Answer of Brown, et al.

That in so far as the fundamental and primary controversy in this suit is the determination of whether or not the said Austin B. Fletcher, testamentary trustee aforesaid, shall pay over to these defendants the said \$10,000 now in his hands with interest thereon, such controversy is a separable and distinct controversy between the said Austin B. Fletcher, testamentary trustee as aforesaid, and these defendants, and that it is a controversy wholly between citizens of different states, to wit, between the said Austin B. Fletcher, testamentary trustee as aforesaid, a citizen of the State of New York, and these defendants, citizens of the State of Pennsylvania.

That on its face the plaintiff in this suit, Austin B. Fletcher, as trustee, seeks primarily to file his account; but that under the guise of a general prayer that a decree should be made "determining the rights of the various parties among themselves," the said plaintiff is seeking to raise a separate and distinct controversy between these defendants, citizens of Pennsylvania, and Conrad Morris Braker, a citizen either of Connecticut, or of New York, as to the validity of the deed of assignment to the balance of the said legacy of \$10,000. That in such controversy, if and when it should arise, the plaintiff herein has no interest save as a stakeholder. That in the suit recited in the petition of Austin B. Fletcher, testamentary trustee as aforesaid, brought by the said Conrad Morris Braker to impeach the validity and set aside the said assignment of the said legacy of \$10,000, these defendants were not made parties, and the said suit and any judgment entered or to be entered therein cannot affect the interests of these defendants, and any attempt so to give effect to such judgment constitutes the taking of the property

Answer of Brown, et al.

of these defendants without due process of law contrary to the provisions of the Constitution of the United States.

These defendants are advised that any further answer to the said petition is premature and unnecessary, unless and until by cross-bill, or otherwise, the said Conrad Morris Braker shall seek to impeach the validity of the aforesaid assignments.

Wherefore, these defendants having fully answered, confessed, traversed and avoided or denied all the matters in the said petition material to be answered, according to their best knowledge and belief, humbly pray this Honorable Court to enter its decree, that these defendants be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

JOHN A. S. BROWN,

FRANK E. SCHERMERHORN,

*As Trustee for Clara Schermerhorn
under the Last Will and Testa-
ment of Thomas Cunningham,
Deceased.*

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } ss.:

John A. S. Brown, and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, being duly sworn, according to law, depose and say that they are the defendants in the above entitled action, and that the facts set forth in the foregoing answer, so far as they are stated upon their own knowledge are

Answer of Brown, et al.

true, and so far as they are stated upon information and belief, they believe them to be true.

Sworn to and subscribed before me this fifth day of July, A. D. 1912.	}	JOHN A. S. BROWN, FRANK E. SCHERMERHORN, <i>As Trustee for Clara Schermerhorn, Under the Last Will and Testament of Thomas Cunningham, Deceased.</i>
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GEORGE KOPPENHOEFER, JR.,
(Seal) *Notary Public.*

My commission expires March 10, 1913.

U. S. District Court, S. D. of N. Y.

Filed Jul. 6, 1912.

A Copy.

THOS. ALEXANDER,
(Seal) *Clerk.*

(Indorsed: "U. S. District Court, Southern District of N. Y. Austin B. Fletcher, as Testamentary Trustee, etc., vs. John A. S. Brown and Frank E. Schermerhorn, as Trustee, etc. Answer of John A. S. Brown and Frank E. Schermerhorn, as Trustee, etc., to the Petition of Austin B. Fletcher, Testamentary Trustee, etc. U. S. District Court. Filed Jul. 6, 1912. M., S. D. of N. Y. Fredric W. Frost, Solicitor for Defendants, 60 Wall Street, New York City. U. S. District Court. Filed Oct. 8, 1912, S. D. of N. Y. Eq. 7-231, U. S. Dist. Ct. So. Dist. of New York. Brown vs. Fletcher, Complots. Exhibit 17, Wm. Parkin, Ex'r.")

Opinion (Lacombe, C. J.) Granting Motion to Remand
 OPINION (LACOMBE, C. J.) GRANTING MOTION
 TO REMAND.

(Inserted by Agreement of Counsel.)

U. S. DISTRICT COURT,
 SOUTHERN DISTRICT OF NEW YORK.

In the Matter
 of
Accounting of Austin B. Fletcher as
 Testamentary Trustee, etc. } L-9-152.

LACOMBE, C. J.:

It seems at least doubtful whether this controversy is properly in this Court; under well-settled principles, therefore, it should be remanded. Motion granted.

(Indorsed: "L 9-152. In the Matter of Accounting of Austin B. Fletcher, &c. Opinion, Lacombe, J., U. S. District Court. Jul. 20, 1912. M., S. D. of N. Y.")

Order

ORDER.

(COMPLAINANTS' EXHIBIT, No. 18.)

*In the Matter of the Accounting of
Austin B. Fletcher as Testa-
mentary Trustee for Conrad
Morris Braker Under the Last
Will and Testament of Conrad
Braker, Jr., Deceased.* } Law 9. 152.

At a stated term of the District Court of the United States, for the Southern District of New York, held at the court room thereof at the Post Office Building, in the city of New York, borough of Manhattan, on the twenty-sixth day of July, 1912.

Present: HON. E. HENRY LACOMBE, Judge.

On reading the affidavit of William P. S. Melvin, verified July 3, 1912, and the notice of motion for an order that this cause was improperly removed to this court and that the same be remanded to the court from whence it came;

Now, after hearing Mr. William P. S. Melvin, of counsel for the said Austin B. Fletcher, as testamentary trustee, in favor of the motion, and Mr. Charles H. Burr, of counsel for the defendants, John A. S. Brown and Frank E. Schermerhorn, as trustees for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, in opposition,

Order

IT IS ORDERED, that this cause was improperly removed to this court, and that the same be, and it is hereby, remanded to the Surrogates' Court of the County of New York, State of New York, from whence it came, and that this remand shall be immediately carried into execution with costs to the said Austin B. Fletcher, as testamentary trustee, against the said defendants, to be taxed by the clerk of this court.

(Seal) E. HENRY LACOMBE,
U. S. C. J.

Copy received July 22, 1912.

FREDRIC W. FROST,
*Attorney for John A. S. Brown, et
al., Defendants.*

U. S. District Court, S. D. of N. Y.

Filed Jul. 27, 1912.

A Copy.

(Seal) THOMAS ALEXANDER,
Clerk.

(Indorsed: "United States District Court, Southern District of New York. In the matter of the Accounting of Austin B. Fletcher, as Testamentary Trustee for Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased. [Copy.] Order remanding proceedings. William P. S. Melvin, Attorney for Austin B. Fletcher, as Trustee. Office & P. O. Address, 165 Broadway, Borough of Manhattan, New York City. Copy received July 29, 1912. Copy received July 22, 1912. Fredric W. Frost, Atty. for John

Order

A. S. Brown, et al., defendants. U. S. District Court. Filed Oct. 8, 1912, S. D. of N. Y. Eq. 7-231. Sir: Please take notice that the within proposed order will be submitted for signature and entry to Hon. Henry E. Lacombe, Justice at his Chambers at the Post-office Building, in the City of New York, on the 24th day of July, 1912, at 10 o'clock A. M. Dated July 22, 1912. Yours, etc. William P. S. Melvin, Atty. for Test'y Trustee, 165 Broadway, New York City. To Fredric W. Frost, Esq., Atty. for John A. S. Brown, et al., defendants. U. S. Dist. Ct. So. Dist. of N. Y. Brown vs. Fletcher, Compls. Exhibit 18, Wm. Parkin, Ex'r.")

Affidavit and Order

AFFIDAVIT AND ORDER.

(COMPLAINANTS' EXHIBITS, NOS. 19 AND 20.)

*In the Matter of the Accounting of
Austin B. Fletcher, as Testa-
mentary Trustee of Conrad Mor-
ris Braker, Under the Last Will
and Testament of Conrad
Braker, Jr., Deceased.*

At a session of the District Court of the United States, held in and for the Southern District of New York, at the Post Office Building in the city of New York on the sixth day of August, 1912.

Present: HON. E. HENRY LACOMBE, Justice.

On reading and filing the affidavit of Charles H. Burr, verified the sixth day of August, 1912, hereto annexed and

On motion of the said Charles H. Burr, it is

Ordered that Austin B. Fletcher, as testamentary trustee aforesaid, show cause before the Hon. E. Henry Lacombe, sitting as District Judge of the United States in the District Court of the United States for the Southern District of New York, on the tenth day of September, 1912, in the Post Office Building in the city of New York, at 11 A. M., why the motion for a rehearing of the motion to remand heretofore argued in this case should not be granted, and it is

Affidavit and Order

Further ordered that the order to remand heretofore granted in this case and all other proceedings so far as any proceedings in this court are concerned shall be stayed until the disposition be had of the aforesaid motion for a re-hearing.

Enter.

E. HENRY LACOMBE,
U. S. C. J.

A Copy.

THOS. ALEXANDER,
(Seal) *Clerk.*

Exhibit 20,
WM. PARKIN, *Ex'r.*

Affidavit and Order

DISTRICT COURT OF THE UNITED STATES, FOR THE SOUTHERN DISTRICT OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
Under the Last Will and Testament
of Conrad Braker, Jr., Deceased.*

COUNTY OF NEW YORK, ss.:

Charles H. Burr, being duly sworn says that he is of counsel for John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, who are respondents to a citation issued in this matter; that these proceedings arise upon an accounting filed by Austin B. Fletcher, as trustee aforesaid, in the Surrogate's Court for the County of New York. The citation therein was returnable at the Surrogate's Court on the fourteenth day of May, 1912. That upon the said fourteenth day of May, 1912, John A. S. Brown and Frank E. Schermerhorn, as trustee aforesaid, appeared in the Surrogate's Court and filed a petition for removal to the District Court of the United States for the Southern District of New York and presented their bond. That thereafter, in pursuance to the said petition the said cause was removed to this court and a certified copy of the record in said proceedings was filed in this court. That after argument in this court, upon motion to remand, this court did on July 26, 1912, order and direct that the proceedings herein should be remanded to the state court.

Affidavit and Order

That while this cause was pending in the court the said John A. S. Brown and Frank E. Schermerhorn, trustee as aforesaid, filed in this court their answer under oath to the said petition of Austin B. Fletcher, as testamentary trustee aforesaid, and served notice thereof on William P. S. Melvin, as attorney for the said petitioner.

That after the presenting of the petition for removal to the state court, and on the same day, to wit, the fourteenth day of May, 1912, an answer was filed in the state court by one of the respondents to the citation issued thereon, namely, Conrad Morris Braker. That a copy of the answer of the said Conrad Morris Braker is hereto attached and made a part of this affidavit. That an examination of the said answer shows it is in the nature of a cross-bill seeking the cancellation of certain assignments held by John A. S. Brown and Frank E. Schermerhorn, as trustee aforesaid.

That in the affidavits and motion to remand in this case the cause alleged why this proceeding should be remanded is for defect in the bond presented by the said John A. S. Brown and Frank E. Schermerhorn, as trustee aforesaid, with the said petition for removal and on account of certain questions of the citizenship of the parties.

That the answer of Conrad Morris Braker, although part of the record, was inadvertently not known to have been filed by deponent and the same was not presented to or argued before this court. That the said answer, constituting a cross-bill, raises a distinct and separable controversy and removes any doubt as to the propriety of said removal. That on the twenty-ninth day of July, 1912, a certified copy of order of award was filed in the Surrogate's Court without the answer of the said John A. S. Brown and Frank E.

Affidavit and Order

Schermerhorn, as trustee, as aforesaid being filed with it, but the same remains on the files of this court. That thereupon, on August 2, 1912, without notice to the said John A. S. Brown and Frank E. Schermerhorn, trustee as aforesaid, the Surrogate entered a decree on account of the default in filing an answer.

Deponent further says that there was not argued at the hearing on the motion to remand in this case the effect of the new judicial code on the question as to discretionary powers of this court.

For the reasons above stated, deponent prays that a re-hearing of the motion to remand may be granted and that in the meantime proceedings so far as the order of this court shall operate, shall be stayed.

Sworn to before me this
6th day of August, 1912. } CHARLES H. BURR.

FREDRIC H. RIDGEWAY,
Notary Public,
Westchester County.
Certificate filed in New York.

SURROGATE'S COURT OF THE COUNTY OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testa-
mentary Trustee of Conrad Mor-
ris Braker, Under the Last Will
and Testament of Conrad
Braker, Jr., Deceased.* } Answer.

Conrad Morris Baker appearing in this proceeding by Safford A. Crummey, his attorney, in answer to the petition

Affidavit and Order

I. Admits the allegations contained in paragraphs numbered 1st, 2nd, 3rd, 4th, 5th and 11th of the petition.

II. Admits the allegations contained in paragraphs numbered 8th and 9th and further alleges that at the trial of the action in the Supreme Court of the State of New York therein mentioned the New York Finance Company appeared and participated in the trial and judgment was thereupon rendered and entered on February 5, 1912, that the assignment dated June 13, 1901, from Conrad Morris Braker to Frank L. Rabe and the assignment, dated October 1, 1901, from Frank L. Rabe to New York Finance Company were and are usurious and void; that Frank L. Rabe and New York Finance Company acquired no interest under said instruments of June 13, 1901, and October 1, 1901, in the legacy of \$10,000, payable to Conrad Morris Braker on July 21, 1910, under the will of his father Conrad Braker, Jr., deceased, and ordering Frank L. Rabe and New York Finance Company to deliver up and surrender said instruments of June 13, 1901, and October 1, 1901, to be cancelled and ordering the Register of the county of New York to cancel of record in his office the instrument dated June 13, 1901, from Conrad Morris Braker to Frank L. Rabe and the Surrogate of New York county to cancel of record in his office the instrument dated June 13, 1901, from Conrad Morris Braker to Frank L. Rabe and the Surrogate of New York County to cancel of record in his office the instrument dated October 1, 1901, from Frank L. Rabe to New York Finance Company in so far as it refers to said instrument of June 13, 1901.

III. Admits the allegations contained in paragraph 10 of the petition, but alleges that John A. S. Brown and Frank E. Schermerhorn, as trustee for

Affidavit and Order

Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, mentioned in said paragraph as complainants in said action had notice of the pendency of said action in the Supreme Court of the State of New York mentioned and described in paragraph 8th and 9th of the petition in this proceeding shortly after said action in the Supreme Court was commenced and before judgment was entered therein.

IV. Alleges said John A. S. Brown and Frank E. Schermerhorn as trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, have no interest in the said trust fund of \$10,000 to be administered upon in this proceeding.

V. Alleges that Conrad Morris Braker is entitled to receive said fund of \$10,000 and accumulated interest from July 21, 1910, less the commissions and expenses of the trustees and the expenses of this accounting.

WHEREFORE, Conrad Morris Braker asks that the decree of this court be made awarding to him the said fund of \$10,000 and accumulated interest from July 21, 1910, less the commissions and expenses of the trustees and the expenses of this accounting.

SAFFORD A. CRUMMEY,
Attorney for Conrad Morris Braker,
 Office and Post Office Address,
 165 Broadway,
 Borough of Manhattan,
 New York City.

A Copy.

THOS. ALEXANDER,
 (Seal) *Clerk.*

Exhibit 19,
 WM. PARKIN, *Ex'r.*

Opinion (Lacombe, C. J.) Denying Motion to Reconsider Order to Remand.

(Indorsed: "District Court of the United States for the Southern District of New York. L. 9-152. In the matter of the Accounting of Austin B. Fletcher, as Testamentary Trustee for Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., deceased. Affidavit and Order. Fredric W. Frost and Charles H. Burr, Attorneys for John A. S. Brown and Frank E. Schermerhorn, as Trustee, etc., Office & Post-office address, 60 Wall Street, Borough of Manhattan, City of New York. U. S. District Court. Filed Oct. 8, 1912, S. D. of N. Y. Eq. 7-231. U. S. District Court, So. District of N. Y. Brown vs. Fletcher, Complots. Exhibits 19 & 20, Wm. Parkin, Ex'r.")

OPINION (LACOMBE, C. J.) DENYING MOTION
TO RECONSIDER ORDER TO REMAND.

(Inserted by Agreement of Counsel.)

U. S. DISTRICT COURT,
SOUTHERN DISTRICT OF N. Y.

<i>In the Matter</i>	}
<i>of</i>	
<i>Austin B. Fletcher as Testamentary Trustee.</i>	

LACOMBE, C. J.:

It cannot be assumed that the moving parties will be prejudiced by the circumstance that the so-called "answer" they filed while the cause was still in this

Opinion (Lacombe, C. J.) Denying Motion to Reconsider Order to Remand.

court was not transmitted to the State Court with the other papers after remand. It was stated that motion to permit its filing in that court (or the filing of a similar pleading) has been made and decision reserved until after the disposition of this application for rehearing; and it must be assumed that the State Court will give all parties full opportunity to present whatever they may be advised.

This Court, after re-argument, remains of its original opinion that this particular proceeding should be prosecuted to conclusion in the State Court. Whatever controversy there may be between Braker and the others is already in this Court in the suit brought by Brown and Schermerhorn. Motion for reconsideration of order to remand is denied.

Sept. 30, 1912.

E. H. LACOMBE,
U. S. C. J.

(Indorsed: "Law 9-152. Memorandum U. S. District Court Sep. 30, 1912. M., S. D. of N. Y.")

Affidavit and Order

AFFIDAVIT AND ORDER.

(COMPLAINANTS' EXHIBITS, NOS. 21 AND 22.)

SURROGATE'S COURT OF THE COUNTY OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testa-
mentary Trustee of Conrad Mor-
ris Braker, Under the Last Will
and Testament of Conrad
Braker, Jr., Deceased.*

Upon reading the annexed affidavit of Charles H. Burr, verified 9th day of August, 1912, the order of Hon. E. Henry Lacombe, United States Circuit Judge, dated August 6, 1912, and the decree entered herein on August 2, 1912, and all the papers and proceedings had herein, it is

Ordered that the above named Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker under the last will and testament of Conrad Baker, Jr., deceased, appear before one of the surrogates of the county of New York, at chambers, in the Hall of Records, in the borough of Manhattan, New York City, on the 17th day of September, 1912, at 10.30 o'clock in the forenoon or as soon thereafter as counsel can be heard, and show cause why the decree entered herein on August 2, 1912, settling and confirming the accounting of the said testamentary trustee herein, and directing distribution by him, should not be vacated, set aside and annulled, and why the moving parties should not have such other and further relief as may be just.

Affidavit and Order

It is further ordered that pending the argument upon the motion noticed by this order to show cause and the entry of an order thereupon that the said Austin B. Fletcher as testamentary trustee and his attorney be stayed from proceeding under or pursuant to said decree of August 2, 1912.

Let service of this order upon William P. S. Melvin, Esq., attorney for Austin B. Fletcher as testamentary trustee herein, on or before the 15th day of August, 1912, be sufficient.

Dated August 10, 1912.

JOHN P. COHALAN,
Surrogate.

Exhibit 22.

WM. PARKIN, *Ex'r.*

SURROGATE'S COURT OF THE COUNTY OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher, as Testa-
mentary Trustee of Conrad Mor-
ris Braker, Under the Last Will
and Testament of Conrad
Braker, Jr., Deceased.*

STATE OF PENNSYLVANIA, ss.:
COUNTY OF PHILADELPHIA,

Charles H. Burr, being duly sworn, says that he is of counsel in this proceeding for John A. S. Brown and Frank E. Schermerhorn, as testamentary trustee of Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased. That the proceed-

Affidavit and Order

ing herein is an accounting proceeding instituted in the Surrogate's Court of the county of New York by Austin B. Fletcher, as testamentary trustee for Conrad Morris Braker under the last will and testament of Conrad Braker, Jr., deceased. That a citation was issued herein returnable at the Surrogate's Court on the fourteenth day of May, 1912. That on the said date the said John A. S. Brown and Frank E. Schermerhorn, as testamentary trustee aforesaid, appeared specially and filed a petition for removal to the United States District Court for the Southern District of New York and a bond. That thereafter, after an amendment to the said bond was moved and allowed by this court on the twelfth day of June, 1912, the proceedings herein were removed to the United States District Court, for the Southern District of New York. That on July 3, 1912, a motion was made by William P. S. Melvin, Esq., in the United States District Court, for the Southern District of New York, for the remanding of the proceedings in this case, and that by an order dated July 26, 1912, of the said United States District Court, filed July 29, 1912, the said proceedings were remanded to this court. That while the said proceedings were removed to the District Court of the United States, for the Southern District of New York, to wit, on the sixth day of July, 1912, the said John A. S. Brown and Frank E. Schermerhorn, as trustee aforesaid, filed their answer in this proceeding to the petition of Austin B. Fletcher, as testamentary trustee aforesaid, and served the same upon William P. S. Melvin, attorney for the said Austin B. Fletcher, as testamentary trustee aforesaid, a copy of which answer is hereto attached and made a part of this affidavit.

Affidavit and Order

That furthermore, Fredric W. Frost, as attorney for the said John A. S. Brown and Frank E. Schermerhorn, as trustee as aforesaid, entered his general appearance in this case for the said respondents and served notice of the entry of such general appearance upon the said William P. S. Melvin, as attorney for Austin B. Fletcher, as testamentary trustee aforesaid.

That while deponent and Fredric W. Frost, attorney for the said John A. S. Brown and Frank E. Schermerhorn, as trustee aforesaid, were conferring with respect to the taking an appeal from the order remanding these proceedings to the Circuit Court of Appeals of the United States, for the Second Circuit, or as to the filing of the petition for a rehearing by the said United States District Court, for the Southern District of New York, the said William P. S. Melvin, by an affidavit verified the twenty-ninth day of July, 1912, filed in this court, averred that no appearances had been entered in this proceeding by anyone except Conrad Morris Braker, who appeared by one Safford A. Crummey. Deponent states that Safford A. Crummey and William P. S. Melvin are associated in the same office in the practice of law with one another, and with the said Austin B. Fletcher, as testamentary trustee aforesaid, and that they have in this proceeding at all times appeared together in court and co-operated. That the affidavit that no appearances have been offered in this cause is untrue as to John A. S. Brown and Frank E. Schermerhorn, as trustee aforesaid, inasmuch as the said John A. S. Brown and Frank E. Schermerhorn, as trustee aforesaid, did file an answer and make and enter their general appearance by Fredric W. Frost, attorney, in the District Court of the United States, for the Southern District of New York,

Affidavit and Order

while these proceedings were pending in said court. That the affidavit of the said William P. S. Melvin, verified the twenty-ninth day of July, 1912, and presented to this court as the basis for its decree of August 2, 1912, omits all reference and mention of the removal of these proceedings to the United States District Court, for the Southern District of New York, and of the answer of the said John A. S. Brown and Frank E. Schermerhorn, as testamentary trustee, filed therein and served upon the said William P. S. Melvin, as attorney for the said Austin B. Fletcher, as testamentary trustee therein.

That on the second day of August, 1912, the said William P. S. Melvin without notice to the said Brown and Schermerhorn procured a decree of this court to be granted by Hon. John P. Cohalan, Surrogate, upon the said affidavit of regularity of the said Melvin, verified July 29, 1912, containing the said untrue and incorrect statements. That said decree directed that the accounts of the said Austin B. Fletcher, as testamentary trustee as aforesaid, be settled and allowed, and that the said Austin B. Fletcher, as such trustee, should pay to the said Conrad Morris Braker the sum of ten thousand dollars (\$10,000). Deponent alleges that said order was obtained from this court by collusion between counsel for the said trustee and for the said Conrad Morris Braker, to wit, William P. S. Melvin and Safford A. Crummey, who occupy the same suite of offices, and was obtained by the suppression of the said answer of John A. S. Brown and Frank E. Schermerhorn, as trustee aforesaid, a copy of which is attached to this affidavit. Deponent further says that an order has been granted by the Hon. E. Henry Lacombe in the District Court of the United States, for

Affidavit and Order

the Southern District of New York, dated August 6, 1912, directing the said Austin B. Fletcher, as testamentary trustee as aforesaid, to show cause in the said United States District Court, on the tenth day of September, 1912, why the motion for a re-hearing of the motion to remand this case should not be granted, and further staying said order to remand and all proceedings in the said court in said case. A copy of said order of Mr. Justice Lacombe is hereto annexed.

Deponent further says that an order to show cause with a stay is necessary herein for the reason that the said Austin B. Fletcher, as testamentary trustee aforesaid, may at any time pay said sum of ten thousand dollars (\$10,000) to the said Conrad Morris Braker under the decree obtained by his attorney herein on August 2, 1912, as aforesaid, and deponent further says that no previous or other application for the relief herein asked has been made to any court or judge, and asks that an order be granted directing the said Austin B. Fletcher, testamentary trustee herein, to appear and show cause why the decree granted herein on August 2, 1912, should not be vacated, set aside and annulled, and further that all proceedings under said decree be in the meantime stayed.

Sworn to before me this }
9th day of August, 1912. } CHARLES H. BURR.

JANE E. CLEGG,
Notary Public.

Commission expires February 21, 1915.

Continental Hotel, Philadelphia, Pa.

7103

Affidavit (Notary).

(Seal)

Affidavit and Order

STATE OF PENNSYLVANIA, } ss.:
COUNTY OF PHILADELPHIA, }

I, Henry F. Walton, prothonotary of the county of Philadelphia, and clerk of the courts of common pleas of said county, which are courts of record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify: That Jane E. Clegg, Esquire, before whom the annexed affidavit was made, was at the time of so doing a Notary Public for the Commonwealth of Pennsylvania, residing in the county of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of deeds or conveyances for lands, tenements, and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given, as well in courts of judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, this ninth day of August, in the year of our Lord one thousand nine hundred and twelve (1912).

HENRY F. WALTON,
Prothonotary.

Exhibit 21,
WM. PARKIN, *Ex'r.*

Affidavit and Order

Form 61.

3900-11 (B) 3000.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

I, Daniel J. Dowdney, Clerk of the Surrogates' Court of said County, do hereby certify that I have compared the foregoing copy of Affidavit and Order in the matter of the Estate of Conrad Braker, Jr., deceased, with the original record thereof, now remaining in this office and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof I have hereunto set my hand and affixed the seal of the Surrogates' Court of the County of New York this 20th day of August, in the year of our Lord, one thousand nine hundred and twelve.

DANIEL J. DOWDNEY,
(Seal) *Clerk of the Surrogates' Court.*

(Endorsed: "Surrogates' Court, New York County. In the Matter of the Accounting of Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the last Will and Testament of Conrad Braker, Jr., deceased. Affidavit and Order. Fredric W. Frost and Charles H. Burr, Attorneys for John A. S. Brown and Frank E. Schermerhorn, as Trustee, etc., Office and Post Office Address, 60 Wall Street, Borough of Manhattan, City of New York. U. S. District Court, filed Oct. 8, 1912, S. D. of N. Y. Eq. 7-231. U. S. Dist. Ct. So. Dist. of N. Y. Brown vs. Fletcher, Compls.' Exhibits 21 & 22, Wm. Parkin, Ex'r.")

*Order to Amend Answer and Minutes Thereof*ORDER TO AMEND ANSWER AND MINUTES
THEREOF.

At a Term of the District Court of the United States for the Southern District of New York, held at the Post-Office Building, in the City of New York, on the 20th day of November, 1912.

Present—HON. GEORGE C. HOLT, Justice.

<i>John A. S. Brown and Frank E. Schermerhorn, Trustee, etc.,</i>	} In Equity.
<i>against</i>	
<i>Austin B. Fletcher, as Trustee, etc.</i>	
	E-7.
	No. 231.

This cause coming on to be heard, and a preliminary motion having been made on the part of the defendant to amend the answer herein by setting up as an additional defence the following:

“And for a further and separate defence, the defendant avers that heretofore, on or about the second day of August, 1912, a decree was entered in the proceedings hereinbefore referred to in the answer as pending in the Surrogates’ Court of the County of New York, respecting the said trust fund, whereby it was judicially found that the cash balance in the hands of said trustee, with interest, amounted to the sum of \$10,731.37; and it was ordered, adjudged and decreed that out of said balance said trustee retain the sum of \$726.59, for the commissions to which he was entitled; and that he pay over to Conrad Morris Braker the sum remaining, namely; the sum of

Order to Amend Answer and Minutes Thereof

\$10,004.78; and that, upon making such payment, said Austin B. Fletcher should be discharged from all further liability on account of said trust fund created under the 14th clause of the Last Will and Testament of Conrad Braker, deceased."

Complainants having waived formal notice of the motion, and the Court having heard Mr. William P. S. Melvin, defendant's counsel, in favor of the motion, and Mr. Charles H. Burr, complainant's counsel, in opposition,

IT IS HEREBY ORDERED that the motion be, and the same is hereby granted.

And it appearing by the Defendant's Record now before the Court that defendant's Exhibits L. M, N. O. P. Q, R. S. T. U and V are reported to the Court by the Examiner, as certified copies of the records in said proceedings in the Surrogates' Court, exemplification of the same in accordance with the Act of Congress now having been waived in open court by complainants' counsel, the same are now read as testimony pertinent to the amended answer, with the same force and effect as having been taken before the Examiner, and certified by him to the Court.

GEORGE C. HOLT,
J.

(Indorsed: "United States District Court, Southern District of New York. John A. S. Brown, et al. against Austin B. Fletcher, as Trustee. Order. William P. S. Melvin, Attorney for Defendant, 165 Broadway, New York City.")

Order to Amend Answer and Minutes Thereof

DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK.

<i>John A. S. Brown and Others,</i>	}	In Equity.
Plaintiffs		Before
vs.		Hon. Geo. C.
<i>Austin B. Fletcher,</i>		Holt,
Defendant		District Judge.

New York, November 20, 1912.

Appearances:

F. W. FROST, Esq., for plaintiffs;

W. P. S. MELVIN, Esq., for defendant.

MR. MELVIN:

The defendant asks to amend his answer, or to file a supplemental answer, stating as follows:

And for a further and separate defence the defendant avers that heretofore, on or about the 2d day of August, 1912, a decree was entered in the proceedings herein before referred to, in the matter pending in the Surrogates' Court of the County of New York, respecting the said trust fund, whereby it was judicially found that the cash balance in the hands of said Trustee, with interest, amounted to the sum of \$10,731.37, and it was ordered, adjudged and decreed that out of said balance said Trustee retain the sum of \$726.59 for the commission to which he was entitled, and that he pay over to Conrad Morris Bracker, the sum remaining, namely the sum of \$10,004.78, and that upon making such payment said Austin B. Fletcher should be discharged from all further liability on account of said trust fund created under the

Order to Amend Answer and Minutes Thereof

14th clause of the last will and testament of Conrad Bracker, Jr., deceased.

Mr. Frost objects to the proposed amendment.

THE COURT: I don't see any objection to this amendment being allowed, so that the party may raise the point—whatever he wishes to claim as the effect of the proceeding in the Surrogates' Court—if that proceeding is conclusive; if it has no weight, then, of course, it has no weight; there is no reason why he shouldn't be allowed to raise a point about it.

I will grant the motion and allow the amendment. Now, you want to give proof of your allegations I suppose?

MR. MELVIN: I have the decree exemplified now and I understand there is no objection to the form of the decree.

A simple proceeding would be to go before the Examiner, if you have taken all your evidence before the Examiner, and give whatever evidence you wish to give in addition, and then come back here, or, if you are willing to do it now, do it now; only you will get your record in shape for more technical points if you are not careful.

Mr. Frost says he has no objection.

Mr. Melvin offers in evidence the decree of the Surrogates' Court.

It is understood that the entire record, everything connected with the case, may be submitted.

Opinion (Holt, J.) Dismissing Bill

OPINION (HOLT, J.) DISMISSING BILL.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT
OF NEW YORK.

*John A. S. Brown, a Citizen of the
State of Pennsylvania, and Frank
E. Schermerhorn, as Trustee,
Under the Last Will and Testa-
ment of Thomas Cunningham, De-
ceased, and a Citizen of the State
of Pennsylvania,*

Complainants,
against

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
Under the Last Will and Testa-
ment of Conrad Braker, Jr., De-
ceased, and a Citizen of the State
of New York,*

Defendant.

FREDRIC W. FROST (CHARLES H. BURR, of counsel),
for complainants;

WILLIAM P. S. MELVIN, for defendant.

HOLT, J.:

This is a suit in equity to recover \$10,000 held by the defendant as testamentary trustee under a trust which directed the payment of that amount to Conrad Morris Braker upon his attaining a certain age, which he has already reached. The complainants allege in the bill that they are entitled to receive such legacy by virtue of certain assignments, one by Braker to Rabe, another by Rabe to the New York Finance Company, and another by the New York Finance Com-

Opinion Dismissing Bill

pany to the complainants. The defendant originally demurred to the bill upon a number of grounds. The demurrer was heard before Judge Hand, who overruled it. In my opinion, the defenses pleaded in the answer, which were passed upon in the decision of the demurrer, should be held to have been determined by that decision. The evidence taken upon final hearing does not present any different questions in regard to such grounds of defense from those which appeared on the face of the bill, and under those circumstances the presentation of those questions to be litigated again upon the final hearing simply amounts to trying the same question over before another judge.

The answer pleads as a defense a judgment recovered in an action brought in the New York Supreme Court by Conrad Morris Braker against the New York Finance Company, Rabe, and the defendant, holding that the assignments from Braker to Rabe and from Rabe to the New York Finance Company were usurious and void. The pendency of such action was one of the grounds of demurrer, but at the time the demurrer was interposed, no judgment had been rendered. The effect of that judgment therefore was not passed upon in the decision upon the demurrer. I think that the judgment in the New York Supreme Court is immaterial in this case because the complainants Brown and Schermerhorn were not made parties to that action, and are not bound by the judgment rendered in it.

The principal defense relied on is the claim that a decree of the Surrogate of the New York County that the defendant pay the money in his hands to Braker, rendered in a proceeding brought by the defendant in that court for an accounting in respect to his liability for the said \$10,000,—is a bar to the com-

Opinion Dismissing Bill

plainants' recovery in this case. After this suit was brought, the defendant instituted the proceedings in the Surrogate's Court for an accounting, and in his petition joined as parties the complainants in this suit, among others. The pendency of a suit in a Federal Court is not a bar to a suit brought in a State Court between the same parties involving the same issues. But if two suits are pending, one in a Federal Court and one in a State Court, between the same parties and involving the same issues, and a judgment is recovered in one of them, such a judgment is *res judicata* upon the issues raised in the other suit. In this case, therefore, the judgment in the Surrogate's Court, to the effect that the fund in question should be paid by the trustee to Braker, is a bar to the claim in this suit that the fund in question should be paid to the complainants, Brown and Schermerhorn, if the Surrogate had jurisdiction to render the decree in the Surrogate's Court. The complainants claim that he had no such jurisdiction. The complainants are non-residents of this State, and could not be served personally within this county. The cause of action in the proceedings in the Surrogate's Court related to a fund situated in this county and was an action *in rem*. Substituted service on non-residents of New York was therefore authorized by the New York Code of Procedure. Sec. 2524 of that Code provides that service of a citation by publication shall be made by publication of the citation in two newspapers, or at the option of the petitioner, by delivering a copy of the citation, without the State to each person named in it in person, and that the order must also contain a direction that on or before the date of the first publication the petitioner deposit in a specified post office a copy of the citation, and of the order, contained in a se-

Opinion Dismissing Bill

curely closed postpaid wrapper, directed to the person to be served, at a place specified in the order. Such an order was made. The proof shows that after the order of publication for substitution service was made the citation was personally served upon Brown and Schermerhorn outside of the State, but there is no proof that copies of the citation were sent to them by mail; and it is claimed therefore that the Surrogate's Court obtained no jurisdiction. This objection is highly technical, and is, in my opinion, of doubtful validity under the New York authorities (*Kennedy vs. Arthur*, 33 State Rep. 147; *Matter of Field*, 131 N. Y. 184; *Sabin vs. Kendrick*, 2 A. D. 96), although undoubtedly the general rule is that the provisions of a statute authorizing service by publication must be strictly complied with in all essential respects. But whether jurisdiction over Brown and Schermerhorn was originally obtained by service of the citation seems immaterial. They subsequently appeared in the Surrogate's Court, served a general notice of appearance, and filed a petition to remove the controversy, as between the complainants and the defendant, to this court. Such removal was ordered, but subsequently, on motion, this Court remanded the case to the Surrogate's Court. In my opinion the general appearance of the complainants in the Surrogate's Court, although it may have been entered solely for the purpose of obtaining the removal of the case to the Federal Court, conferred jurisdiction upon the Surrogates' Court over the complainants, and authorized it, after the proceedings were remanded, to proceed to a decree which would bind them.

The complainants further claim that the Surrogate's Court had no jurisdiction to render a decree on the ground that it was represented to that court

Opinion Dismissing Bill

that the complainants had not appeared in that court, and that the Surrogate entered the decree in reliance on that representation. Whatever the fact may be in that respect, such a representation if made, in my opinion, did not destroy the jurisdiction of the Surrogate's Court. After the complainants had appeared generally in that court, that court had jurisdiction, both of the subject-matter and of the persons of the complainants. If there is any ground on which that decree should be vacated and the complainants given a hearing, an application should be made to the Surrogate's Court for that purpose; but that Court having rendered a decree, after it had obtained jurisdiction of the person and the subject-matter, I think that its decree is conclusive upon the complainants until set aside by that Court, or reversed upon appeal. The claim that the decree entered is not final because a motion to open it has been made seems to me untenable. The decree has been entered, and has not yet been vacated. Even if it should be vacated, I think that the Surrogate's Court having once entered its decree, will continue thereafter in sole control of the litigation.

My conclusion therefore is that the bill in this suit should be dismissed with costs.

G. C. H.

December 20, 1912.

(Indorsed: "No. 451. E-7-231. District Court of the United States for the Southern District of New York. John A. S. Brown and Frank E. Schermerhorn against Austin B. Fletcher. Opinion. Holt, J. U. S. District Court. Filed Dec. 20, 1912, S. D. of N. Y.")

Petition for Rehearing, and Order

PETITION FOR REHEARING, AND ORDER.

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTH-
ERN DISTRICT OF NEW YORK.

*John A. S. Brown, a Citizen of the
State of Pennsylvania, and Frank
E. Schermerhorn, Trustee for
Clara Schermerhorn, Under the
Last Will and Testament of
Thomas Cunningham, Deceased,
and a Citizen of the State of
Pennsylvania,*

vs.

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
Under the Last Will and Testament
of Conrad Braker, Jr., Deceased,
and a Citizen of the State of New
York.*

In Equity.
Eq. 7,
No. 231.

PETITION FOR REHEARING.

The petition of John A. S. Brown, a citizen of the State of Pennsylvania, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, a citizen of the State of Pennsylvania, for a rehearing of the above entitled cause, respectfully represents:

That on the twentieth day of December, 1912, your Honorable Court delivered its opinion, dismissing the Bill theretofore filed by the Complainant in this action.

That the main question involved in this case is the determination of whether a judgment or decree of the Surrogate's Court of the County of New York in

Petition for Rehearing, and Order

an action for an accounting wherein defendant herein was petitioner and complainants herein, were, among others, joined as parties, is *res judicata*, when service of the citation therein was defective, where the judgment was based on an "Affidavit of Regularity" averring that the respondents therein had not appeared or answered, when, as a matter of fact, they had appeared and answered, and where the operation of the judgment had been stayed by the court in which it was entered.

That in the said opinion, your Honorable Court dismisses the contention of the complainants as to defective service by holding that it was cured by a general appearance in the Surrogate's Court. The Court says:

"But whether jurisdiction over Brown and Schermerhorn was originally obtained by service of the citation seems immaterial. *They subsequently appeared in the Surrogate's Court, served a general notice of appearance, and filed a petition to remove the controversy*, as between the complainants and the defendant, to this Court. Such removal was ordered, but subsequently, on motion, this Court remanded the case to the Surrogate's Court. In my opinion, the general appearance of the complainants in the Surrogate's Court, although it may have been entered solely for the purpose of obtaining the removal of the case to the Federal Court, conferred jurisdiction upon the Surrogate's Court over the complainants, and authorized it, after the proceedings were remanded, to proceed to a decree which would bind them."

This, it is respectfully shown, is based on a misunderstanding of the facts. What actually took place was this: On the 14th day of May, 1912, prior to the hearing of the matter raised by the petition in the said

Petition for Rehearing, and Order

Surrogates' Court, complainants herein filed in said Surrogate's Court, their petition for removal to your Honorable Court on the ground of diversity of citizenship. A copy of said petition for removal is set forth in full on page 101 *et seq.*, of complainants' record herein, and was duly executed and verified by complainants, and bore the following appearance on behalf of complainants:—"Fredric W. Frost, Atty., appearing especially for purposes of removal only; 60 Wall Street, New York City." Further evidence of the special character of said appearance is found in the affidavit of the said Fredric W. Frost for a rule to show cause verified the fifth day of June, a copy of which is set forth in complainants' record, page 115 *et seq.*, which contains (page 116) the following averment: "That upon the fourteenth day of May, 1912, the return day of said citation, deponent, *appearing specially for the purpose of removal only*, filed a petition and bond for removal of said cause." This appearance constituted an appearance for one purpose only, removal to this court, and cannot in any way be said to be a *general* appearance. Subsequently the said action was removed to this Court. Thereafter, to wit, on the third day of June, 1912, the said Fredric W. Frost entered a general appearance in this Court on behalf of complainants and filed an answer. Thereafter, on or about July 29, 1912, William P. S. Melvin, the attorney for the petitioner, made and filed the Affidavit of Regularity, hereinabove referred to, in which he averred that no appearance had been entered and no answer filed on behalf of complainants. A true and correct copy of said affidavit is attached hereto and made a part hereof, being marked "Exhibit A." On August 2, 1912, the said Surrogate's Court entered a judgment of default against these complainants and

Petition for Rehearing, and Order

ordered distribution of the fund to another claimant. A copy of said judgment is set forth on page 120 of defendant's record. Subsequently, on being shown the incorrectness of the said affidavit of regularity, the said Surrogate's Court issued an order on the petitioner therein, to show cause why the judgment so entered should not be vacated and set aside, and staying proceedings under said judgment (Complainants' record, page 146).

It cannot need more than a statement of these facts to show that complainants are entitled to a rehearing of the present action. Complainants' contention as to jurisdiction is overruled on the ground that they have entered a *general* appearance in the Surrogate's Court, when, as a matter of fact, they had only entered a *special* appearance to remove. They were ready to defend the action in this Court and stood upon their rights under the laws of the United States and especially under the Judiciary Act approved March 3, 1911, as citizens of Pennsylvania, engaged in a controversy with a citizen of New York. Surely it cannot be maintained that such an appearance in the Surrogate's Court waived any right that they had to insist on proper service in that court. The subsequent general appearance in this court, on June 3, 1912 (Complainants' Record, p. 113), was made for the purpose of contesting the action under Federal protection, and cannot be said to amount to a general appearance in the Surrogate's Court, waiving a radical and basic objection therein to the jurisdiction therein. If the assumption that complainants had waived their objection to the defective service falls, the declaration that it supports must fall with it, and the objection to jurisdiction on the ground of defective service becomes fatal to defendant's claim of *res judicata*.

Petition for Rehearing, and Order

WHEREFORE, your petitioners pray that your Honorable Court grant to them a re-hearing of the present cause at such time and in such manner as to your Honorable Court may seem meet, all other proceedings in this case, so far as any proceedings in this Court are concerned, to stay.

And your petitioners will ever pray, &c.

JOHN A. S. BROWN,
FRANK E. SCHERMERHORN,
*As Trustee for Clara Schermerhorn Under
the Last Will and Testament of Thomas
Cunningham, Deceased.*

FREDRIC W. FROST,
Attorney for Complainants-Petitioners.

STATE OF PENNSYLVANIA,
CITY AND COUNTY OF PHILADELPHIA, } ss.:

Charles H. Burr, being duly sworn, deposes and says that he is of counsel for the complainants in the above entitled action, who are the petitioners named in the foregoing petition, and that the facts set forth in said petition are true. Deponent further says that in his opinion the foregoing petition for a rehearing is filed in accordance with the principles of law and equity, and in the interests of justice.

Sworn and subscribed before me this 26th day of December, 1912. } CHARLES H. BURR.

GEORGE KOPPENHOEFER, JR.,
(Seal) *Notary Public.*

My Commission expires March 10, 1913.

Petition for Rehearing, and Order

8522

Affidavit (Notary).

STATE OF PENNSYLVANIA, }
 COUNTY OF PHILADELPHIA, } ss.:

I, HENRY F. WALTON, Prothonotary of the County of Philadelphia and Clerk of the Courts of Common Pleas of said County, which are Courts of Record having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following Certificate, do Certify, That GEORGE KOPPENHOEFER, JR., ESQUIRE, before whom the annexed affidavit was made, was at the time of so doing a NOTARY PUBLIC for the Commonwealth of Pennsylvania residing in the County of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgments and proofs of Deeds or Conveyances for lands, tenements, and hereditaments to be recorded in said State of Pennsylvania, and to all whose acts, as such full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said Notary Public and verily believe his signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court this 26th day of Dec. in the
 (Seal) year of our Lord, one thousand nine hundred and twelve (1912).

HENRY F. WALTON,
Prothonotary.

Petition for Rehearing, and Order

"EXHIBIT A."

SURROGATE'S COURT, COUNTY OF NEW YORK.

*In the Matter of the Accounting of
Austin B. Fletcher as Testamen-
tary Trustee for Conrad Morris
Braker, Under the Last Will and
Testament of Conrad Braker, Jr.,
Deceased.*

COUNTY OF NEW YORK, ss.:

WILLIAM P. S. MELVIN, being duly sworn, says that he is the attorney for the Accounting Trustee herein. That all the parties to this proceeding have been duly cited or have duly waived the issuance and service of a citation, approved the accounts filed herein and consented to the entry of a decree approving and settling the same, in the manner and form following, to wit:

I. By service of a copy of the citation issued herein upon the following persons, in the manner prescribed by Sections 2520, 2526 and 2527 of the Code of Civil Procedure, as more fully appears by the proof of service thereof, made in the manner and form prescribed by law and filed herein on the first day of May, 1912, viz.: on

(Name)	(When)	(Where)
Conrad Morris Braker	March 22, 1912,	529 West 150th St., New York City.
New York Finance Co.	April 5, 1912,	Post Office Bldg., New York City.

Petition for Rehearing, and Order

II. By service thereof without the State or by publication in pursuance of an order made herein on the 22nd day of March, 1912, under Sections 2522 and 2523 of the Code of Civil Procedure, as more fully appears by the proof of service thereof made in the manner prescribed by law, and filed herein on the first day of May, 1912, namely, on:

(Name)	(When)	(Where)
John A. S. Brown,	April 12, 1912,	Philadelphia, Pa.
Frank E. Schermerhorn	April 10, 1912,	Philadelphia, Pa.
Charles Z. Wolff,	April 10, 1912,	Philadelphia, Pa.

III. None of the parties cited has appeared herein except Conrad Morris Braker, who has appeared by his attorney Safford A. Crummey.

IV. That all of the persons named herein are of full age and sound mind except those hereinbefore stated to be otherwise, and comprise all the parties, as deponent verily believes, who have any interest in this proceeding.

Sworn to before me this 29th day of July, 1912.	} WM. P. S. MELVIN.
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JOHN C. DANIEL,
Notary Public,
Kings County.

Cert. filed in New York Co. No. 76.

[Indorsed: "Surrogate's Court County of New York. In the matter of the Accounting of Austin B. Fletcher as Trustee, &c. Conrad Braker, Jr., Deceased. Affidavit of Regularity. William P. S. Melvin, Atty. for Austin B. Fletcher as Trustee, Office and P. O. Address 165 Broadway, Borough of Manhattan, New York City."]

Petition for Rehearing, and Order

IN THE DISTRICT COURT OF THE UNITED STATES, SOUTH-
ERN DISTRICT OF NEW YORK.

*John A. S. Brown, a Citizen of the
State of Pennsylvania, and Frank
E. Schermerhorn, Trustee for
Clara Schermerhorn, Under the
Last Will and Testament of
Thomas Cunningham, Deceased,
and a Citizen of the State of
Pennsylvania,*

vs.

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
Under the Last Will and Testa-
ment of Conrad Braker, Jr., De-
ceased, and a Citizen of the State
of New York.*

In Equity.
Eq. 7,
No. 231.

Present: HON. GEORGE C. HOLT, Justice.

On reading and filing the petition of John A. S. Brown and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, complainants herein for a rehearing of this cause, and the affidavit of Charles H. Burr, of counsel for said complainant, in support thereof hereto annexed and

On motion of Fredric W. Frost, Esq., it is ORDERED that Austin B. Fletcher as Testamentary Trustee as aforesaid show cause before the Honorable George C. Holt, District Judge of the United States for the Southern District of New York, on the 6th day of January, 1913, in the Post Office Building in the City of New York, at 10½ A. M.—motion to be heard on

Petition for Rehearing, and Order

bankruptcy motion calendar—why the prayer of the petition of complainants for a re-hearing of this cause should not be granted and it is further

ORDERED THAT ALL PROCEEDINGS in this case, so far as any proceedings in this Court are concerned, shall be stayed until the disposition be had of the aforesaid petition for a rehearing.

FURTHER ORDERED that service of this order and the papers upon which it is granted upon the defendant or his attorney on or before the 30th day of December, 1912, shall be sufficient.

GEO. C. HOLT,
U. S. D. J.

Dated, Decr. 27, 1912.

(Indorsed: "U. S. D. C., S. D. of N. Y. In Equity. Eq. 7, No. 231. John A. S. Brown, a Citizen of the State of Pennsylvania and Frank E. Schermerhorn, Trustee for Clara Schermerhorn under the last will and testament of Thomas Cunningham, deceased, and a citizen of the State of Pennsylvania, vs. Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York. Petition of Complainants for a re-hearing, Affidavit in support thereof and Order of Court thereon, and Affidavit of Service. Fredric W. Frost, Attorney for Complainants, 60 Wall Street, New York City.")

Order Denying Rehearing

ORDER DENYING REHEARING.

At a Stated Term of the District Court of the United States for the Southern District of New York for the trial of issue, held at the Court Room thereof in the Post Office Building in the City of New York, on the 10 day of January, 1913.

Present: HON. GEORGE C. HOLT, Judge.

John A. S. Brown, a Citizen of the State of Pennsylvania, and Frank E. Schermerhorn, as Trustee Under the Last Will and Testament of Thomas Cunningham, Deceased, and a Citizen of the State of Pennsylvania,

Complainants,

against

Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, Under the Last Will and Testament of Conrad Braker, Jr., Deceased, and a Citizen of the State of New York,

Defendant.

In Equity.
E. 7. 231.

The motion in this cause coming on before me, at the Court Room No. 66, in the Post Office Building, in the City and County of New York, on an order to show cause made by me on the 27th day of December, 1912, based on the petition of the complainants, why the

Order Denying Rehearing

prayer of the complainants for a rehearing of the cause should not be granted.

Now, after hearing Mr. Monroe Buckley, of counsel for complainants, in favor of the motion, and Mr. William P. S. Melvin, counsel for the defendant, in opposition thereto.

It is Ordered that the motion be and the same is hereby denied to the defendant.

It is further Ordered that the stay of all proceedings in this case be and the same is hereby vacated.

GEO. C. HOLT,
J.

(Indorsed: "E-7-231. U. S. District Court, Southern District of New York. John A. S. Brown and Frank E. Schermerhorn, as Trustee, &c., Complainants, against Austin B. Fletcher, as Testamentary Trustee, &c., Defendant. Order. Sir: You will please take notice that within proposed order will be submitted for settlement to Hon. George C. Holt, Judge, at his Chambers, in the Post Office Building, in the City of New York [Manhattan] on the 10th day of January, 1913, at 10.30 A. M. Yours, &c. William P. S. Melvin, Def'ts. Atty. To Frederick W. Frost, Esq., Atty. for Compl'ts., 60 Wall Street, New York City. Copy received, Jany. 8, 1913. Fredric W. Frost, Solicitor for Complts. U. S. District Court, Jan. 13, 1913, M., S. D. of N. Y.")

Order Dismissing Bill

ORDER DISMISSING BILL.

At a Stated Term of the District Court of the United States for the Southern District of New York, for the trial of issues, held at the Court Room thereof in the Post Office Building, in the City of New York, on the 13th day of January, 1913.

Present, HON. GEORGE C. HOLT, Judge.

John A. S. Brown, a Citizen of the State of Pennsylvania, and Frank E. Schermerhorn, as Trustee Under the Last Will and Testament of Thomas Cunningham, Deceased, and a Citizen of the State of Pennsylvania,

Complainants,

against

Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, Under the Last Will and Testament of Conrad Braker, Jr., Deceased, and a Citizen of the State of New York,

Defendant.

In Equity.
E. 7. 231.

This cause coming on for final hearing in its order on the equity calendar of the court upon the pleadings and the testimony and evidence herein taken before William Parkin, Esq., as special examiner,

Order Dismissing Bill

Now, after hearing Mr. Charles H. Burr, of counsel for the complainants, and Mr. William P. S. Melvin, counsel for the defendant, and after rehearing granted and had,

IT IS ORDERED, ADJUDGED AND DECREED that the bill of complaint be and the same is hereby dismissed, with costs against said complainants, to be taxed by the Clerk.

GEO. C. HOLT,
J.

(Indorsed: "U. S. District Court, Southern District of New York. Eq.-7-231. John A. S. Brown and Frank E. Schermerhorn as Trustee, etc., Complainants, vs. Austin B. Fletcher, as Testamentary Trustee, etc., Defendant. Order and Decree. Fredric W. Frost, Attorney for Complts., 60 Wall Street, New York City. U. S. District Court, Filed Jan. 13, 1913, S. D. of N. Y.")

Final Record

FINAL RECORD.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK.

*John A. S. Brown, a Citizen of the
State of Pennsylvania, et al.,*

vs.

*Austin B. Fletcher, as Testamentary
Trustee, &c.*

In Equity.
7—231.

The complainants in the above entitled cause, filed their bill of complaint, which is hereunto annexed on the 7th day of June, one thousand nine hundred and eleven, and the writ of subpoena was thereupon issued, and returned personally served.

And on the 4th day of December thereafter, a demurrer to said bill of complaint was filed, the same being hereto annexed.

On the 6th day of March thereafter, a decree was filed overruling demurrer. On the 23rd day of April thereafter an answer to said bill of complaint was filed the same being hereto annexed.

On the 13th day of May thereafter the complainant filed a replication, the same being hereto annexed.

Testimony was thereafter taken by the respective parties, and filed in the clerk's office of the said District Court.

Afterwards, and at the November term, 1912, of said Court, present the Honorable George C. Holt, the said cause came on to be heard on the pleadings and proofs, and was argued by counsel. On the 13th day

Final Record

of January, one thousand nine hundred and thirteen, the said Court caused its final decree to be entered herein, in favor of the defendant, by which it was adjudged that the bill of complaint be dismissed with costs against complainants.

And the costs having been taxed by the clerk at Seventy-seven 35/100 dollars, the process, pleadings, and decrees together with other papers filed in said cause, are duly annexed hereunto.

Wherefore let the said defendant recover of said complainants the sum of Seventy-seven 35/100 dollars, as adjudged in said final decree, the cost and charges as taxed.

Signed and enrolled this 17th day of January, A. D. 1913.

ALEX. GILCHRIST, JR.,
Clerk.

(Indorsed: "E-7-231. United States District Court, Southern District of New York. John A. S. Brown, &c., et al., vs. Austin B. Fletcher, &c. In Equity. Final Record. Dated January 17, 1913. Solicitor. Damages \$. Costs \$77.35. Total, \$. Copy received. Fredric W. Frost, 60 Wall Street. Jany. 20, 1913, Adm.")

Petition for Appeal and Allowance Thereof
 PETITION FOR APPEAL AND ALLOWANCE
 THEREOF.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN
 DISTRICT OF NEW YORK.

*John A. S. Brown, a Citizen of the
 State of Pennsylvania, and Frank
 E. Schermerhorn, as Trustee for
 Clara Schermerhorn Under the
 Last Will and Testament of
 Thomas Cunningham, Deceased,
 and a Citizen of the State of Penn-
 sylvania,*

Complainants,

against

*Austin B. Fletcher, as Testamentary
 Trustee of Conrad Morris Braker,
 Under the Last Will and Testa-
 ment of Conrad Braker, Jr., De-
 ceased, and a Citizen of the State
 of New York,*

Defendant.

In Equity.
 E. 7-231.

To the Honorable GEORGE C. HOLT, District Judge:

The above named complainants feeling themselves aggrieved by the decree made and entered in this cause on the thirteenth day of January, A. D. 1913, do hereby appeal from said decree to the United States Circuit Court of Appeals for the Second Circuit, for the reasons specified in the assignments of errors, which is filed herewith, and they pray that their appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers

Petition for Appeal and Allowance Thereof

upon which said decree was based, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Second Circuit.

Your petitioners further pray that the said appeal shall operate as a supersedeas upon your petitioners filing a bond in such amount as the Court may require for such purpose, and that the proper order touching the security to be required of your petitioners to protect their appeal be made.

FREDRIC W. FROST,
Attorney for Appellants,
 60 Wall Street,
 New York City,
 New York.

CHARLES H. BURR,
Of Counsel.

The foregoing petition is granted and the appeal is allowed.

GEO. C. HOLT,
U. S. D. J.

Dated New York, January 14, 1913.

(Indorsed: "United States District Court, Southern District of New York. In Equity. E-7-231. John A. S. Brown, &c., and Frank E. Schermerhorn as Trustee, &c., Complainants-Appellants, vs. Austin B. Fletcher, as Testamentary Trustee, &c. Petition for Appeal and Supersedeas and Order Granting Same. Fredric W. Frost, Attorney for Complainants-Appellants, 60 Wall Street, New York City, N. Y. Copy received, Jan. 15, '13, Wm. P. S. Melvin, Atty. for Deft. U. S. District Court. Filed Jan. 15, 1913, S. D. of N. Y.")

Assignment of Errors

DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK.

*John A. S. Brown, and Frank E.
Schmerhorn, as Trustee for
Clara Schmerhorn, Under the
Last Will and Testament of
Thomas Cunningham, Deceased,
Complainants,*

vs.

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
Under the Last Will and Testa-
ment of Conrad Braker, Jr., De-
ceased, and a Citizen of the State
of New York,*

Defendant.

In Equity.
E. 7. 231.

ASSIGNMENT OF ERRORS.

AND NOW come John A. S. Brown and Frank E. Schmerhorn, as trustee for Clara Schmerhorn, under the last will and testament of Thomas Cunningham, deceased, the above-named complainants and make and file this their Assignment of Errors.

First: The learned District Court of the United States for the Southern District of New York erred in dismissing the Bill of Complaint in the above-entitled cause after hearing on bill, answer, replication and proofs and rehearing.

Second: The said Court erred in failing to enter a decree for complainants in the above entitled cause after hearing on bill, answer, replication and proofs, and rehearing.

Assignment of Errors

Third: The said Court erred in sustaining the sufficiency of the plea of *res judicata* raised by the amended answer of defendant to the Bill of Complaint in the above entitled cause.

Fourth: The said Court erred in sustaining the sufficiency of the plea of *res judicata* raised by the amended answer of the defendant to the Bill of Complaint in the above entitled cause for the reason that the said Court which entered the decree so sought to be raised had no jurisdiction of these complainants, who were attempted to be made parties defendant therein.

Fifth: The said Court erred in sustaining the sufficiency of the plea of *res judicata* raised by the amended answer of the defendant to the Bill of Complaint in the above entitled cause for the reason that the Court which entered the decree so sought to be used had no jurisdiction of the cause of action as respects these complainants, said jurisdiction having lodged in the United States District Court from which this appeal was taken, by virtue of the institution of the above entitled action prior to the institution of the suit the decree of which was sought to be used as *res judicata*.

Sixth: The said Court erred in sustaining the sufficiency of the plea of *res judicata* raised by the amended answer of the defendant to the Bill of Complaint in the above entitled cause for the reason that the decree sought to be used as *res judicata* was not a final decree, but one the operation of which had been stayed by the Court which rendered it.

Assignment of Errors

WHEREFORE the complainants pray that the said decree be reversed and the said District Court of the United States for the Southern District of New York be instructed to enter such decree as is prayed for by said Bill.

FREDRIC W. FROST,
Attorney for Complainants,
60 Wall Street,
New York City,
New York.

CHARLES H. BURR,
Of Counsel.

(Indorsed: "United States District Court, Southern District of New York. In Equity. E-7-231. John A. S. Brown, &c., and Frank E. Schermerhorn as Trustee, &c., Complainants-Appellants, vs. Austin B. Fletcher, as Testamentary Trustee, &c., Defendant-Appellee. Assignment of Errors. Fredric W. Frost, Attorney for Complainants-Appellants, 60 Wall Street, New York, New York. Copy rec'd, Jan. 15, '13. Wm. P. S. Melvin, Atty. for Deft. U. S. District Court, Filed Jan. 15, 1913.")

Bond for Appeal and Supersedeas

BOND FOR APPEAL AND SUPERSEDEAS.

DISTRICT COURT OF THE UNITED STATES, SOUTHERN
DISTRICT OF NEW YORK.

*John A. S. Brown, and Frank E.
Schmerhorn, as Trustee for
Clara Schmerhorn, Under the
Last Will and Testament of
Thomas Cunningham, Deceased,*
Complainants,

against

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
Under the Last Will and Testa-
ment of Conrad Braker, Jr., De-
ceased,*

Defendant.

In Equity.
Eq. 7—231.

KNOW ALL MEN BY THESE PRESENTS:

That we, John A. S. Brown and Frank E. Schmerhorn, as Trustee for Clara Schmerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, as principals, and New England Casualty Company, of Boston, Massachusetts, having an office and place of business at 55 John Street, Borough of Manhattan, City, County and State of New York, as sureties acknowledge ourselves to be jointly indebted to Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, appellee in the above cause in the sum of Two hundred fifty and no/100 (\$250.00/100) Dollars, conditioned that,

Bond for Appeal and Supersedeas

WHEREAS on the 13th day of January, 1913, in the District Court of the United States for the Southern District of New York in a suit pending in that Court wherein the said John A. S. Brown and Frank E. Schermerhorn, as trustee, &c., were complainants and the said Austin B. Fletcher, as testamentary trustee, &c., was defendant, numbered on the Equity Docket as E. 7, No. 231, a Decree was rendered against the said John A. S. Brown and Frank E. Schermerhorn, as trustee, &c., and the said John A. S. Brown and Frank E. Schermerhorn, as trustee, &c., having obtained an appeal to the United States Circuit Court of Appeals for the Second Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse the said Decree and a citation directed to the said Austin B. Fletcher, as testamentary trustee, &c., citing and admonishing him to be and appear at a session of the said United States Circuit Court of Appeals for the Second Circuit to be holden in the City of New York, in the State of New York, on the 12th day of February, A. D. 1913 next.

Now, if the said John A. S. Brown and Frank E. Schermerhorn, as trustee, &c., shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

IN WITNESS WHEREOF, the said John A. S. Brown and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn under the Last Will and Testament of Thomas Cunningham, deceased, have hereunto set their hands and seals, and the said New England Casualty Company has caused these presents to be signed by its Resident Vice-President and attested by its Resident Asst. Secretary and its corporate seal to be

Bond for Appeal and Supersedeas

hereunto affixed, this done the 14th day of January,
A. D. 1913.

(Sgd.) JOHN A. S. BROWN (L. S.)

FRANK E. SCHERMERHORN (L. S.)

*As Trustee for Clara Schermerhorn under the
Last Will and Testament of Thomas Cun-
ningham, Deceased.*

In presence of:

(Sgd.) RAYMOND C. KARGE.

MONROE BUCKLEY.

NEW ENGLAND CASUALTY COMPANY,

By GEORGE T. PARKER,

Resident Vice-President.

Attest:

JAMES E. SWEENEY,

Resident Asst. Secretary.

Approved January 14, 1913.

GEO. C. HOLT,

U. S. D. J.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On this 14th day of January, 1913, before me personally appeared George T. Parker, Resident Vice-President of the New England Casualty Company, with whom I am personally acquainted, who, being by me duly sworn, said: that he resides in the State of New York; that he is a Resident Vice-President of the New England Casualty Company the corporation described in and which executed the foregoing instrument; that he knows the corporate seal of the said

Bond for Appeal and Supersedeas

company; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said company; and that he signed his name thereto as Resident Vice-President by like authority; and the said George T. Parker further says that he is acquainted with James E. Sweeney and knows him to be a Resident Assistant Secretary of said Company; that the signature of the said James E. Sweeney subscribed to said instrument, is in the genuine handwriting of said James E. Sweeney and was thereto subscribed by like order of said Board of Directors and in the presence of him, the said George T. Parker, and that the liabilities of the said Company do not exceed its assets, as ascertained in the manner provided in Chapter 33 of the Laws of 1909, constituting Chapter 28 of the Consolidated Laws of the State of New York, and known as the Insurance Law.

GEORGE T. PARKER.

J. F. ANDERSON,

(Seal) *Notary Public No. 38, for
County of New York.*

Certificate filed in Kings County.

At an adjourned special meeting of the stockholders of the New England Casualty Company duly called and held at the office of the company in the city of Boston, Massachusetts, on the 18th day of September, 1911, a quorum being present the following by-law was duly adopted:

Art. XVI., Section 1.

"All bonds, recognizances or contracts of indemnity policies of insurance and other writings obligatory in the nature thereof shall be signed by the Presi-

Bond for Appeal and Supersedeas

dent, First Vice-President, Vice-President, Resident Vice-President or attorney in fact, and except when signed by an attorney in fact shall have the seal of the Company affixed thereto, duly attested by the Secretary, Assistant Secretary or Resident Assistant Secretary."

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

I, James E. Sweeney, Resident Assistant Secretary of the New England Casualty Company have compared the foregoing By-Law with the original thereof, as recorded in the Minute Book of the said Company, and do hereby certify that the same is a correct and true transcript therefrom and of the whole of Article XVI., Section 1, of said original By-Law.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the said company at the City of New York this 14th day of January, 1913.

JAMES E. SWEENEY,
Resident Assistant Secretary.

(Seal)

(Indorsed: "United States District Court, Southern District of New York. In Equity. E-7-No. 231. John A. S. Brown, etc. and Frank E. Schermerhorn, as Trustee, etc., Appellants, vs. Austin B. Fletcher, as Testamentary Trustee, &c. Bond for Appeal and Supersedeas. Fredric W. Frost, Attorney for Appellants, 60 Wall Street, New York, New York. Copy rec'd. Jan. 15, 1913, Wm. P. S. Melvin, Atty. for Deft. U. S. District Court, Filed Jan. 15, 1913, S. D. of N. Y.")

Citation

CITATION.

By the Honorable George C. Holt, One of the Judges of the District Court of the United States for the Southern District of New York, in the Second Circuit.

To Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, Under the Last Will and Testament of Conrad Braker, Jr., Deceased, and a Citizen of the State of New York,

GREETING:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the city of New York, in the District and Circuit above named, on the 12th day of February, 1913, pursuant to a Petition for Appeal filed in the Clerk's Office of the District Court of the United States for the Southern District of New York, wherein John A. S. Brown, etc., and Frank E. Schermerhorn, as Trustee, etc., are Complainants and you are Defendant to show cause, if any there be, why the Decree in said Petition mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 14th day of January, in the year of our Lord One Thousand Nine Hundred and Thirteen, and of the Independence of the United States the One Hundred and Thirty-seventh.

GEO. C. HOLT,

Judge of the District Court of the United States for the Southern District of New York, in the Second Circuit.

Citation

(Indorsed: "United States Circuit Court of Appeals for the Second Circuit. John A. S. Brown, etc., and Frank E. Schermerhorn, as Trustee, etc., Complainants, vs. Austin B. Fletcher, as testamentary trustee, etc. of Conrad Braker, Jr., deceased, etc., Defendant. Citation. Fredric W. Frost, Attorney for Complainants-Appellants, 60 Wall Street, New York City. Due service of a copy of the within Citation is hereby admitted this 15th day of January, 1913. Wm. P. S. Melvin, Attorney for Austin B. Fletcher, as Testamentary Trustee, etc. U. S. District Court, Filed Jan. 15, 1913, S. D. of N. Y.")

Order Determining Contents of Record on Appeal
 ORDER DETERMINING CONTENTS OF RECORD
 ON APPEAL.

At a term of the District Court of the United States, held in and for the Southern District of New York, at the Court House thereof in the United States Post Office Building, in the Borough of Manhattan, City of New York, on the 31st day of January, 1913.

Present: HONORABLE GEORGE C. HOLT,
 United States District Judge.

John A. S. Brown, a Citizen of the State of Pennsylvania, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn Under the Last Will and Testament of Thomas Cunningham, Deceased, and a Citizen of the State of Pennsylvania,

Complainants and Appellants,

vs.

Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, Under the Last Will and Testament of Conrad Braker, Jr., and a Citizen of the State of New York,
 Defendant and Appellee.

In Equity.
 Eq. 7,
 No. 231.

ORDER

A summary application having been made by the above named complainants-appellants, on the 31st day of January, 1913, to determine what shall be printed

Order

as the record on the appeal of this cause to the Circuit Court of Appeals, for the Second Circuit, in accordance with the terms of Rule 26 of this Court, bearing date of May 2, 1912, and it appearing that due notice of such application and of the presentation of this order has been given to the above named defendant-appellee;

Now, on motion of FREDRIC W. FROST, attorney for the complainants-appellants, it is hereby

ORDERED that the printed record on the appeal of this cause to the Circuit Court of Appeals for the Second Circuit shall consist of the following documents or statements, and none others, to wit:

The Bill of Complaint and Exhibits thereto.

Affidavit, verified Nov. 6, 1911, and Notice of Motion for a Stay.

Affidavit in Reply to Motion for a Stay.

Order Denying Motion for a Stay.

Demurrer.

Opinion (Hand, J.), Overruling Demurrer.

Decree Overruling Demurrer.

Affidavit, verified March 23, 1912, and Order to Show Cause why Stay should not be Granted, (Endorsed: "Motion Denied, Noyes, J.").

Answer to Rule to Show Cause why Stay should not be Granted, and Exhibit.

Answer and Exhibits thereto.

Replication.

Affidavit and Order to Show Cause and Order Nunc pro tunc in re Complainant's Testimony.

Complainants' Testimony in chief, and the Exhibits attached to the Bill of Complaint.

Defendant's Evidence and Exhibits.

Complainants' Rebuttal Evidence and Exhibits.

Order

Order to Amend Answer, and if desired, minutes relating thereto.

Opinion (Holt, J.) Dismissing Bill with Costs.

Affidavit and Petition for Rehearing and Order to Show Cause.

Order Denying Motion for Rehearing and Vacating Stay.

Decree Dismissing Bill with Costs to be Taxed. Final Record.

Assignments of Error.

Bond on Appeal.

Petition for Appeal and Order allowing same.

Citation.

Order determining contents of Printed Record on Appeal.

Certification of Clerk of District Court as to Printed Record on Appeal.

It is further

ORDERED that it shall not be necessary for the appellants to print any exhibit, a copy of which was attached to the Bill of Complaint or Answer, more than once in said record.

GEO. C. HOLT,
U. S. D. J.

(Indorsed: "United States District Court, Southern District of New York. In Equity. Eq. 7 No. 231. John A. S. Brown and Frank E. Schermerhorn, &c., Complainants and Appellants vs. Austin B. Fletcher, &c., Defendant and Appellee. Order determining what shall be included in the printed record on appeal. Fredric W. Frost, Attorney for Appellants, 60 Wall Street, New York. U. S. District Court. Filed Jan. 31, 1913, M. S. D. of N. Y.")

ORDER EXTENDING TIME TO DOCKET CASE
AND FILE TRANSCRIPT OF RECORD.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schmerhorn, as Trustee for Clara
Schmerhorn, under the Last Will
and Testament of Thomas Cunning-
ham, deceased, and a citizen of the
State of Pennsylvania,*

Complainants-Appellants,
vs.

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
under the Last Will and Testament
of Conrad Braker, Jr., deceased, and
a citizen of the State of New York,*
Defendant-Appellee.

In Equity.

AND NOW, this 10th day of February, 1913, upon consideration of the annexed affidavit, and upon motion of FREDRIC W. FROST, Esq., Solicitor for the Complainants-Appellants, it is hereby

ORDERED that the time to docket the case and file the transcript of record on appeal in this case be extended from February 12th, 1913, to March first, 1913.

LEARNED HAND,
U. S. District Judge.

(Indorsed: "U. S. D. C., S. D. of N. Y. E.-7-231. In Equity. John A. S. Brown &c et al., Appellants, vs. Austin B. Fletcher, &c. Appellee. Order Extending time for Return of Citation and Affidavit. Fredric W. Frost, Attorney for Appellants, 60 Wall Street, New York City. U. S. D. C., S. D. of N. Y. Filed Feby. 11, 1913.")

Order Re Printing Evidence on Appeal

ORDER RE PRINTING EVIDENCE ON APPEAL.

At a stated term of the District Court of the United States held in and for the Southern District of New York at the Court House in the United States Post Office Building in the Borough of Manhattan, City of New York, on the 14th day of February, 1913.

PRESENT:

HONORABLE GEORGE C. HOLT,
United States District Judge.

John A. S. Brown, a citizen of the State of Pennsylvania, and Frank E. Schermerhorn, as Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, and a citizen of the State of Pennsylvania,

Complainants-Appellants,

vs.

Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York,

Defendant-Appellee.

In Equity.
Eq. 7-231.

ORDER.

AND NOW, to wit this 14th day of February, 1913, upon consideration of the order to show cause and affi-

Order

davit attached thereto, heretofore granted on the 10th day of February, 1913, and of all the proceedings heretofore had in this cause and upon motion of Fredric W. Frost, Esq., attorney for the complainants-appellants, and after hearing counsel for all parties in said cause, it is

Ordered that the evidence and exhibits in this case be printed in the record on appeal as originally taken and offered and that the requirements of the Equity Rules promulgated by the Supreme Court of the United States, in effect February 1st, 1913, relating to the reduction and preparation of records on appeal, be waived as to this cause.

GEO. C. HOLT,
United States District Judge.

(Indorsed: "United States District Court, Southern District of New York. In Equity. Eq.-7-231, John A. S. Brown &c. et al. Appellants, vs. Austin B. Fletcher &c. Appellee. Order. Fredric W. Frost, Attorney for Appellants, 60 Wall Street, New York City. U. S. D. C. Filed Feb. —, 1913, S. D. of N. Y.")

*Stipulation as to Transcript of Record*STIPULATION AS TO TRANSCRIPT OF
RECORD.

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK.

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schermernhorn, as Trustee for Clara
Schermernhorn, under the Last Will
and Testament of Thomas Cunning-
ham, deceased, and a citizen of the
State of Pennsylvania,*

Complainants-Appellants,

vs.

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker,
under the Last Will and Testament
of Conrad Braker, Jr., deceased, and
a citizen of the State of New York,*
Defendant-Appellee.

Eq. 7-231.
In Equity.

STIPULATION.

It is hereby stipulated and agreed by and between the Complainants-Appellants and the Defendant-Appellee in the above entitled action, binding upon the parties to said action, that the foregoing printed copy is a true transcript of the record as agreed on by the parties to said action.

March 1, 1913.

FREDRIC W. FROST,

Attorney for Complainants-Appellants.

WILLIAM P. S. MELVIN,

Attorney for Defendant-Appellee.

Certificate

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

*John A. S. Brown, a citizen of the State
of Pennsylvania, and Frank E.
Schmerhorn, as Trustee for Clara
Schmerhorn under the Last Will
and Testament of Thomas Cunning-
ham, deceased, and a citizen of the
State of Pennsylvania,*

Complainants-Appellants,

vs.

*Austin B. Fletcher, as Testamentary
Trustee of Conrad Morris Braker
under the Last Will and Testament
of Conrad Braker, Jr., deceased, and
a citizen of the State of New York,*

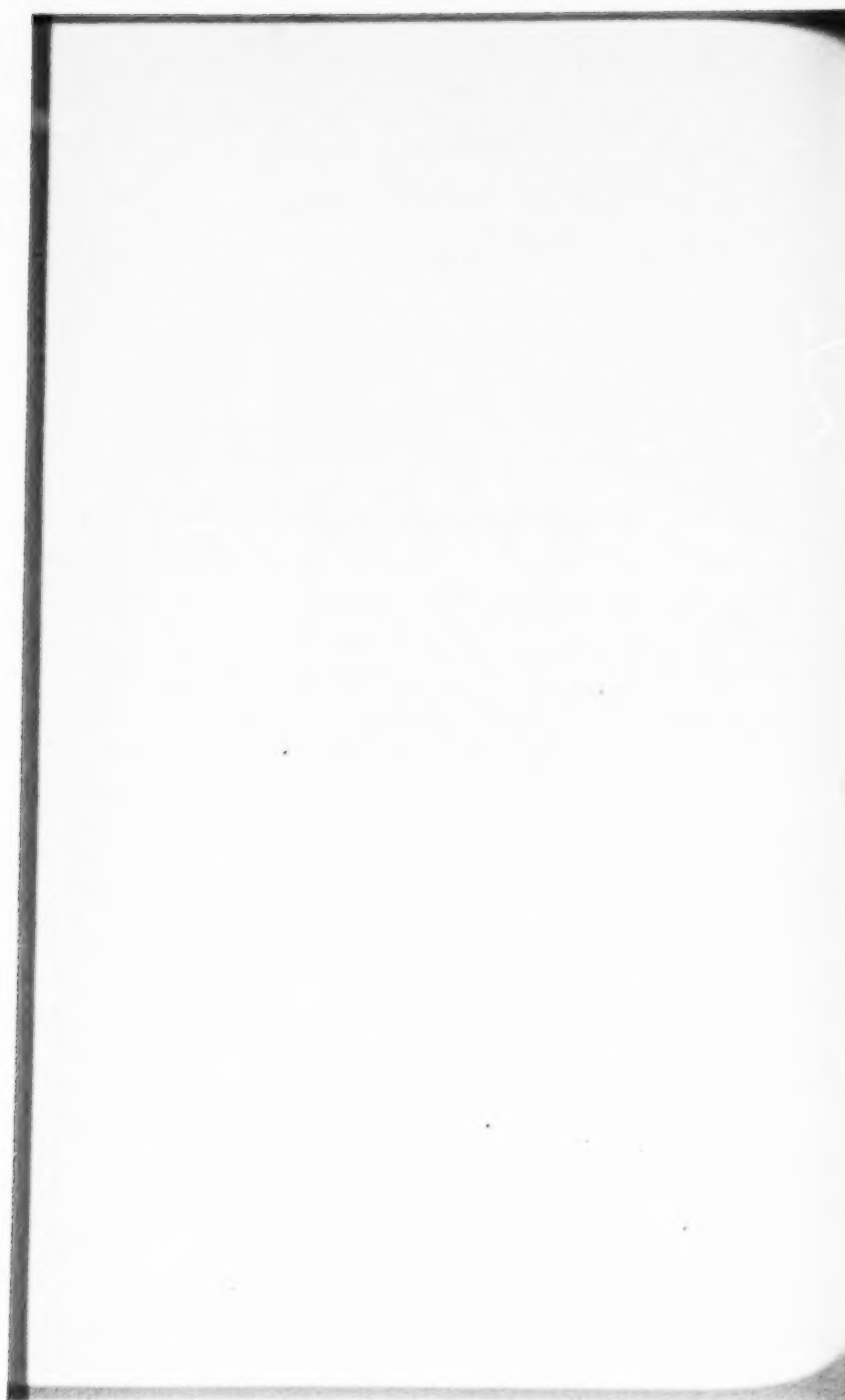
Defendant-Appellee.

I, ALEXANDER GILCHRIST, JR., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this 1st day of March in the year of our Lord one thousand nine hundred and thirteen and of the Independence of the said United States the one hundred and thirty-ninth.

ALEXANDER GILCHRIST, JR.,

Clerk.



UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT.

No. 227. October Term, 1912.

Argued May 27, 1913.

Decided June 27, 1913.

John A. Brown and another,
Complainants-Appellants,

vs.

Austin B. Fletcher, as Trustee, etc.,
Defendant-Appellee.Appeal from the
District Court
of the United
States for the
Southern Dis-
trict of New
York.Before Lacombe,
Coxe and Ward,
Circuit
Judges.

WARD, Circuit Judge:

The complainants, citizens of Pennsylvania, filed this bill against the defendant, a citizen of New York, who had been appointed by the Surrogates Court for the County of New York to succeed the trustee appointed in the will of Conrad Braker, Jr., deceased. It alleges that by virtue of an assignment from Conrad M. Braker and various mesne assignments the complainants are entitled to receive the sum of \$10,000 in the hands of the defendant, as testamentary trustee, which he neglects and refuses to pay. The prayer for relief is that the defendant may be decreed to pay the said sum over to the complainants.

The defendant admits that he has received from the estate of Conrad Braker, Jr., deceased, and now has the sum of \$10,000 in trust to pay the same over to Conrad M. Braker, the decedent's son. He demurred to the bill upon

the ground, among others, that the complainants had a full, adequate and complete remedy at law. Judge Hand overruled the demurrer.

The defendant having raised this question of jurisdiction *in limine* and it having been decided against him, properly answered on the merits without waiving it. We think the objection good. Sec. 723 of the U. S. Rev. Stat. provides:

“723. Suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law.”

The complainants ask for the payment of a sum of money concededly in the defendant's hands which they allege has been duly assigned to them. There is no ground whatever of equitable jurisdiction stated in the bill nor any equitable relief prayed for. The right asserted is completely cognizable and enforceable at law and the defendant has a right to a trial by jury:

“In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.” (Seventh Amendment to the Constitution of the U. S.)

“Sec. 648. The trial of issues of fact in the circuit courts shall be by jury, except in cases of equity and of admiralty and maritime jurisdiction, and except as otherwise provided in proceedings in bankruptcy, and by the next section.” (U. S. Rev. Stat.)

The defendant might have waived this right by not taking the objection, but even if he had done so, the want of jurisdiction being plain on the face of the bill an appellate court has the right to take it *sua sponte*, *Lewis vs. Cocks*, 23 Wall. 466, 470; *Buzard vs. Houston*, 119 U. S.

347; *Indian Land Trust Co. vs. Schoenfelt*, 135 F. R. 484; *Robinson vs. Mutual Reserve Life Ins. Co.*, 193 F. R. 399.

Judge Holt, however, who decided the case at final hearing, treated all questions raised on the demurrer as closed to inquiry before him and disposed of the case upon a defense set up in the answer as follows: After this suit had been instituted the defendant began proceedings to settle his account as testamentary trustee in the Surrogates Court for the County of New York, making the claimants parties and serving them extraterritorially. Thereupon the complainants removed the proceeding from the Surrogates Court into the District Court. Subsequently the proceeding was remanded by order of Judge Lacombe. Thereupon the defendant took a decree in the Surrogates Court against the complainants for want of an appearance and directing the defendant to pay the fund to Conrad M. Braker. Judge Holt dismissed the bill on the ground that this decree was *res adjudicata*; first, because the petition filed for removal constituted a general appearance of the complainants in the Surrogates Court and they were therefore parties to the proceedings and bound by the decree; second, because the decree in the Surrogates Court was in a proceeding *in rem* and the complainants were bound by it, having been duly cited, although served extraterritorially. The removal of the case did not constitute a general appearance of the complainants in the Surrogates Court, *Wabash Western Ry. vs. Brow*, 164 U. S. 271. As to the second ground, we need not inquire whether, under *Byers vs. McAuley*, 149 U. S. 608; *Waterman vs. The Bank*, 215 U. S. 33; *McClellan vs. Carland*, 217 U. S. 268, the District Court, if it had jurisdiction of the cause, was not authorized to determine the rights of the parties, although not authorized to interfere with the possession of the Surrogates Court, because the bill will be dismissed without prejudice for reasons now to be considered.

Treating the action as one in equity, we think the objection that Conrad M. Braker ought to have been made a

party was good. He was within the jurisdiction of the court and a decree in favor of the complainants would have affected his interests most injuriously. Therefore the bill should have been dismissed because he was not brought in as a party, *Waterman vs. The Bank*, 215 U. S. 33, 48.

Moreover, we think the Circuit Court had no jurisdiction on the ground of citizenship because at least two of the assignors under whom the complainants claim, viz.: Conrad M. Braker and the New York Finance Co. were citizens of the State of New York, or at least were not stated to be citizens of any other state, as the complainants were bound to do. The complainants are not asserting a lien in their own right upon Braker's interest in the decedent's estate, as was the case in *Ingersoll vs. Coran*, 211 U. S. 336, but are asserting Braker's title to the sum of \$10,000 to which they say they have succeeded. This is clearly a chose in action; that is, a claim not in possession, but which must be enforced by an action against the trustee, *Sheldon vs. Sill*, 49 U. S. 441. As their assignors could not maintain an action in the District Court, the complainants cannot. Act March 3, 1875, Sec. 1.

The complainants contend that their general appearance in the District Court after removal of the proceedings from the Surrogates Court and their answer filed became a part of the case and should have been returned to the Surrogates Court when the proceeding was remanded. At all events they complain that these facts should have been called to the attention of that court. It is quite probable if they had been, no judgment for want of an appearance would have been entered against them. But their relief must be in that court or by appeal from it. The practice in this district upon remanding cases has been simply to enter an order to that effect without returning proceedings in the case taken in the District Court to the State Court. While what the District Court might do in a removed case subsequently remanded would be invalid as without jurisdiction, it might well be otherwise as to what the parties themselves

did. In the case of *Ayres vs. Wiswall*, 112 U. S. 187, an answer had been filed in the Circuit Court and the case was subsequently remanded. Chief Justice Waite said at p. 190:

“The fact that Ebenezer R. Ayres had filed his answer in the United States Court is a matter of no importance. That fact did not of itself confer jurisdiction if there had been none before. It will be for the State court, when the case gets back there, to determine what shall be done with pleadings filed and testimony taken during the pendency of the suit in the other jurisdiction.”

This language seems to show that the Chief Justice contemplated that proceedings taken in the case in the Circuit Court should be remanded to the State Court and this was the construction of the language taken in *Broadway Ins. Co. vs. Chicago*, 101 F. R. 507, 510. We incline to regard it as the proper practice.

The decree is modified by directing the court below to dismiss the bill, but not upon the merits.

Charles H. Burr, for the Appellants.

W. P. S. Melvin, for the Appellee.

At a stated term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the Court Rooms, in the Post Office Building in the City of New York, on the 7th day of July, one thousand nine hundred and thirteen.

PRESENT:

HON. E. HENRY LACOMBE,
HON. ALFRED C. COXE,
HON. HENRY G. WARD,
Circuit Judges.

John A. Brown and another,
Complainants-Appellants,

VS.

Austin B. Fletcher, as Trustee, etc.,
Defendant-Appellee

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered adjudged and decreed that the decree of said District Court be and it hereby is modified, with costs of this court to the appellant, by directing the court below to dismiss the bill with costs, but not upon the merits.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Endorsed: United States Circuit Court of Appeals,
Second Circuit. J. A. Brown & Ano. vs. A. B.
Fletcher. Order for Mandate. United States Circuit
Court of Appeals, Second Circuit. Filed Jul. 7, 1913,
William Parkin, Clerk.

Endorsed: Mandate should be amended so as to leave the question of costs in the District Court discretionary with the judge of that court. Costs of appeal to appellant. Motion in all other respects denied. All concur. July 18, 1913.

United States Circuit Court of Appeals for the Second Circuit. No. 227. JOHN A. S. BROWN and FRANK E. SCHERMERHORN as trustee for CLARA SCHERMERHORN under the last will and testament of Thomas Cunningham, deceased, Appellants, vs. AUSTIN B. FLETCHER, as testamentary trustee of CONRAD MORRIS BRAKER, under the last will and testament of Conrad Braker, Jr., deceased, Respondent. PETITION. William P. S. Melvin, Solicitor for Respondent, 165 Broadway, New York City.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT.

*John A. S. Brown, a citizen of the State of
Pennsylvania, and Frank E. Schermer-
horn, Trustee for Clara Schermerhorn, un-
der the Last Will and Testament of
Thomas Cunningham, Deceased, and a citi-
zen of the State of Pennsylvania,*
Plaintiffs-Appellants,
against

*Austin B. Fletcher, as Testamentary Trustee
of Conrad Morris Braker, under the Last
Will and Testament of Conrad Braker, Jr.,
Deceased, and a citizen of the State of New
York,*
Defendant-Appellee.

*To the Honorable Justices of the United States Circuit
Court of Appeals for the Second Circuit:*

Your petitioner, Austin B. Fletcher, respectfully shows to the Court that he is the trustee for Conrad Morris Braker, under a certain trust created under the Last Will and Testament of Conrad Braker, Jr., deceased, and that as such trustee he is the defendant in the above-entitled action.

That an appeal was taken in said action to this court from a judgment rendered in the District Court of the United States for the Southern District of New York, dismissing the bill of complaint filed in said action and that said appeal was heard on the 27th day of May, 1913, and

that this court has handed down its opinion whereby it finds that the bill of complaint of the plaintiffs should be dismissed but not upon the merits, and with costs to the plaintiffs, the appellants.

That the Clerk of this Court has sent the mandate of this Court consequent on its determination to the Clerk of the District Court of the United States for the Southern District of New York, and has also taxed the costs awarded by this Court to the appellant, which, as appears by the mandate, amount to \$480.54, namely, costs to Clerk, \$24.95; printing record, \$435.59, and with an attorney's fee of \$20.00.

Your petitioner further shows that, as appears by the opinion of this Court, the bill of complaint is dismissed without prejudice: 1st: Because Conrad M. Braker, your petitioner's *cestui que trust*, ought to have been made a party; and, 2nd: Because the plaintiffs are asserting a right to the trust fund held by petitioner, by virtue of an assignment thereof by said *cestui que trust*, and to which right they (the plaintiffs) have succeeded, and that, inasmuch as their assignors could not maintain an action in the District Court neither could complainants.

Your petitioner further shows that throughout the history of this cause he has urged the same reasons against the maintenance of the action; first, by interposing a demurrer to the bill of complaint, and afterwards by his answer, and, finally, through his counsel by the brief submitted in petitioner's behalf upon the argument of the appeal in this court.

Your petitioner further shows that he feels aggrieved by said determination so far as it pertains to costs, and, inasmuch as the question of costs was not at all presented to the court on the argument of the appeal, your petitioner prays that he may be heard by this honorable court on the

matter of such costs at the next October Term, or at such other time as may be agreeable to the court.

And your petitioner will ever pray, etc.

AUSTIN B. FLETCHER,

Petitioner.

I certify that in my opinion the petitioner has good and valid reason for requesting the re-hearing sought for.

WILLIAM P. S. MELVIN,

Counsel for Petitioner.

At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the court rooms in the Post Office Building, City of New York, on the 29th day of July, 1913.

PRESENT:

HON. E. HENRY LACOMBE,
HON. ALFRED C. COXE,
HON. HENRY G. WARD,
Circuit Judges.

<p><i>John A. S. Brown and Frank E. Schermerhorn, as Trustees, etc.,</i> Complainants-Appellants,</p> <p style="text-align: center;">vs.</p> <p><i>Austin B. Fletcher, as Trustee, etc.,</i> Defendant-Appellee.</p>	}
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A petition for a re-hearing as to costs having been filed herein by counsel for the appellee;

Upon consideration thereof, it is

ORDERED that the mandate issued herein be and hereby is recalled and amended by providing that the question of costs in the District Court be left to the discretion of the judge of that court.

FURTHER ORDERED that the said petition in all other respects be and hereby is denied.

E. HENRY LACOMBE,
U. S. C. J.

Endorsed: United States Circuit Court of Appeals, Second Circuit. John A. S. Brown & ano., vs. A. B. Fletcher. Order. United States Circuit Court of Appeals, Second Circuit. Filed Jul. 29, 1913. William Parkin, Clerk.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 373 inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of

John A. S. Brown and another, as Trustees, etc.,

vs.

Austin B. Fletcher, as Trustee,

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of July, in the year of our Lord One Thousand Nine Hundred and Thirteen, and of the Independence of the United States the One Hundred and Thirty-eighth.

WM. PARKIN,
Clerk.

[Seal of the United
States Circuit
Court of Ap-
peals, Second
Circuit.]



UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Second Circuit, Greeting:

Being informed that there is now pending before you a suit in which John A. S. Brown and Frank E. Schermerhorn, Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, deceased, are appellants, and Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the Last Will and Testament of Conrad Braker, Jr., deceased, is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Southern District of New York, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 4th day of November, in the year of our Lord one thousand nine hundred and thirteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 23,917. Supreme Court of the United States, No. 766, October Term, 1913. John A. S. Brown et al., etc., vs. Austin B. Fletcher, as Testamentary Trustee, etc. Writ of Certiorari.

In the United States Circuit Court of Appeals for the Second Circuit,
October Term, 1912.

In Equity. No. 227.

JOHN A. S. BROWN, a Citizen of the State of Pennsylvania, and Frank E. Schermerhorn, Trustee for Clara Schermerhorn under the Last Will and Testament of Thomas Cunningham, Deceased, and a Citizen of the State of Pennsylvania, Complainants-Appellants,

versus

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker under the Last Will and Testament of Conrad Braker, Jr., Deceased, and a Citizen of the State of New York, Defendant-Appellee.

It is hereby stipulated that the transcript already filed, in the clerk's office of the Supreme Court of the United States, with the

petition for the writ of certiorari, be taken as a return to said writ dated the Fourth day of November, A. D. 1913.

CHARLES H. BURR,
*Attorney for John A. S. Brown and
Frank E. Schermerhorn, Trustee, etc.*
WILLIAM P. S. MELVIN,
*Attorney for Austin B. Fletcher,
as Testamentary Trustee, etc.*

Dated the 7th day of November, A. D. 1913.

Endorsed: United States Circuit Court of Appeals for the Second Circuit. No. 227, October Term, 1912. In Equity. John A. S. Brown, etc., and Frank E. Schermerhorn, Trustee, etc., Complainants-Appellants, versus Austin B. Fletcher as Testamentary Trustee, etc. Stipulation of counsel as to return to writ of certiorari. Charles H. Burr, 328 Chestnut Street, Philadelphia, Penna., Attorney for John A. S. Brown, et al. William P. S. Melvin, 165 Broadway, New York City, N. Y., Attorney for Austin B. Fletcher as Testamentary Trustee. United States Circuit Court of Appeals, Second Circuit. Filed Nov. 10, 1913. William Parkin, Clerk.

To the Supreme Court of the United States, Greeting:

The record and all proceedings whereof mention is within made having lately been certified and filed in the office of the clerk of the Supreme Court of the United States, a copy of the stipulation of counsel is hereto annexed and certified as the return to the writ of certiorari issued herein.

Dated, New York, November 10th, 1913.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN,
*Clerk of the United States Circuit Court
of Appeals for the Second Circuit.*

[Endorsed:] 766/23917. United States Circuit Court of Appeals, Second Circuit. John A. S. Brown, & another, v. Austin B. Fletcher. Return to Writ of Certiorari.

[Endorsed:] File No. 23917. Supreme Court U. S., October term, 1913. Term No. 766. John A. S. Brown et al., Petitioners, vs. Austin B. Fletcher, Trustee, etc. Writ of certiorari and return. Filed Nov. 14, 1913.

286
No. 708.

Supreme Court

FILE

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JAMES W. M.

Term 191

No.

IN THE

Supreme Court of the United States

JOHN A. S. BROWN, a Citizen of the State of Pennsylvania,
and **FRANK E. SCHERMERHORN**, Trustee for Clara
Schermmerhorn Under the Last Will and Testament of
Thomas Cunningham, Deceased, and a Citizen of the State
of Pennsylvania,

Petitioners,

v.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad
Morrie Braker, Under the Last Will and Testament of
Conrad Braker, Jr., Deceased, and a Citizen of the State
of New York,

Respondent.

In the Matter of the Appeal of John A. S. Brown and
Frank E. Schermmerhorn, Trustee for Clara Scher-
merhorn Under the Last Will and Testament of
Thomas Cunningham, Deceased, to the Circuit
Court of Appeals for the Second Circuit, From the
Decree of the District Court of the United States,
for the Southern District of New York.

Notion, with Petition, of John A. S. Brown and Frank
E. Schermmerhorn, Trustee for Clara Schermmerhorn
Under the Last Will and Testament of Thomas
Cunningham, Deceased, Petitioners, for Writ of
Certiorari to be Directed to the Judges of the
Circuit Court of Appeals for the Second Circuit.

CHARLES H. BURE,

*Solicitor for John A. S. Brown
and Frank E. Scherm-
merhorn, Trustees, etc.,*

IN THE
Supreme Court of the United States.

JOHN A. S. BROWN, A CITIZEN OF THE STATE OF PENNSYLVANIA, AND FRANK E. SCHERMERHORN, TRUSTEE FOR CLARA SCHERMERHORN, UNDER THE LAST WILL AND TESTAMENT OF THOMAS CUNNINGHAM, DECEASED, AND A CITIZEN OF THE STATE OF PENNSYLVANIA,

Petitioners,

vs.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND A CITIZEN OF THE STATE OF NEW YORK,

Respondent.

In the Matter of the Appeal of John A. S. Brown and Frank E. Schermerhorn, Trustee for Clara Schermerhorn, Under the Last Will and Testament of Thomas Cunningham, Deceased, to the Circuit Court of Appeals for the Second Circuit, from the Decree of the District Court of the United States for the Southern District of New York.

AND NOW come JOHN A. S. BROWN, a citizen of the State of Pennsylvania, and FRANK E. SCHERMERHORN, trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, and a citi-

zen of the State of Pennsylvania, by CHARLES H. BURR, Esq., their attorney, and move this Honorable Court that it will by certiorari or other proper process, directed to the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit, require said court to certify to this court for its review and determination, a certain cause in said Court of Appeals lately pending, wherein the said petitioners, John A. S. Brown and Frank E. Schermerhorn, were appellants, and the said respondent, Austin B. Fletcher, was appellee; to which end your petitioners tender herewith their petition, with reasons for the granting thereof, with their brief and with a certified copy of the entire record in said cause in said Circuit Court of Appeals.

CHARLES H. BURR,
Solicitor for Petitioners.

IN THE
Supreme Court of the United States.

JOHN A. S. BROWN, A CITIZEN OF THE STATE OF
PENNSYLVANIA, AND FRANK E. SCHERMER-
HORN, TRUSTEE FOR CLARA SCHERMERHORN,
UNDER THE LAST WILL AND TESTAMENT OF THOMAS
CUNNINGHAM, DECEASED, AND A CITIZEN OF THE
STATE OF PENNSYLVANIA,

Petitioners,

vs.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE
OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL
AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED,
AND A CITIZEN OF THE STATE OF NEW YORK,

Respondent.

In the Matter of the Appeal of John A. S. Brown and
Frank E. Schermerhorn, Trustee for Clara Scher-
merhorn, Under the Last Will and Testament of
Thomas Cunningham, Deceased, to the Circuit
Court of Appeals for the Second Circuit, from the
Decree of the District Court of the United States
for the Southern District of New York.

PETITION FOR WRIT OF CERTIORARI.

*To the Honorable the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The petition of JOHN A. S. BROWN, a citizen of
the State of Pennsylvania, and FRANK E. SCHERMER-

HORN, as trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, and a citizen of the State of Pennsylvania, the above named petitioners respectfully shows:

1. That on the seventh day of June, 1911, they filed in the then Circuit Court of the United States for the Southern District of New York a bill in equity (Record, pp. 1-57) against Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, the above named respondent, said respondent having been appointed by the Surrogate's Court of the County of New York, State of New York, to succeed the trustee appointed by the will of Conrad Braker, Jr., deceased, alleging that by virtue of an assignment from Conrad Morris Braker, the *cestui que trust* named in the will of the said decedent, and various mesne assignments, your petitioners are entitled to receive the sum of \$10,000 in the hands of the respondent as testamentary trustee, which he neglects and refuses to pay, and praying that your petitioners might have their rights to the said sum of ten thousand (\$10,000) dollars declared and that the respondent might be ordered to pay to your petitioners that sum.

That on December 4, 1911, a demurrer was filed to said bill (Record, pp. 71-74). The grounds in support of said demurrer were *inter alia* that there was an adequate remedy at law, that the original assignor was a citizen of the same state as complainants, and that these facts deprived the court of jurisdiction. An opinion was filed overruling this demurrer (Record, pp. 75-77) upon the ground that, in the opinion of the district judge, an interest in a trust fund was not a chose in action within the meaning of the Federal statute.

That upon final hearing on bill, answer, replication and proofs, the respondent was permitted to amend by adding to the answer a plea of *res judicata*, namely, a judgment entered in the Surrogate's Court in New York City in an action begun subsequently to the suit at bar.

That on December 20, 1912, an opinion was filed dismissing the bill on the sole ground of *res judicata*. (Opinion, Record, pp. 321-325; decree, Record, pp. 338-339.) The opinion stated that the decision on demurrer of the jurisdictional questions would be followed by the trial judge.

Inasmuch, therefore, as the decision on the jurisdictional questions was in favor of complainants, but against complainants on the plea of *res judicata*, the only appeal open to complainants was to the Court of Appeals and not to this court. Such appeal was on January 14, 1913, allowed and perfected. (Record, p. 342 following.) The assignment of errors (Record, pp. 344-346 was based upon the dismissal of the bill on the ground of *res judicata*.

That on the argument before the said Court of Appeals it was urged by the appellee that the District Court had no jurisdiction. This contention was sustained by the Circuit Court of Appeals in an opinion (Record, pp. 362-366) and a decree (Record, pp. 367-368), which directed the dismissal of the bill upon the ground of lack of jurisdiction, "but not upon the merits."

2. Your petitioners are advised that said judgment or decree of the said Circuit Court of Appeals is final and is erroneous, and that this Honorable Court should require the cause to be certified to it for its review and determination under the Act of Congress permitting cases made final in the Circuit Court of Appeals to be certified for revision.

3. Your petitioners submit in support of this petition the following reasons:

A.

The questions involved are jurisdictional questions peculiarly within the cognizance of this court. If the decision of the Circuit Court of Appeals had been made in the District Court, the only appeal would have been to this court from the decree of dismissal. On certiorari, therefore, this court is asked to review those questions intended by Congress to be committed to its exclusive jurisdiction.

B.

The decision of the Circuit Court of Appeals that the District Court had no jurisdiction because the assignor of a trust fund could not have sued the trustee in a Federal Court on account of lack of diversity of citizenship, is directly opposed to the decision in *Ingersoll vs. Coram*, 211 U. S. 336, though under the facts of that case it cannot be distinguished therefrom. This point is fully argued in the accompanying brief.

C.

The decision of the Circuit Court of Appeals that a claim by an assignee of the cestui que trust of a trust fund against the trustee is, in the Federal Courts, an action NOT of equitable jurisdiction, contravenes that long line of cases beginning with *Fowle vs. Lawrason*, 5 Peters, 495 (vide, p. 503), wherein it is held that following the practice of the High Court of Chancery in England in 1789 equitable jurisdiction exists "in all cases where a trustee is a party," to use the language of Mr. Chief Justice Marshall. This point is also fully argued in the accompanying brief.

D.

The opinion of the Circuit Court of Appeals, left unreviewed, it is respectfully suggested, will unsettle the universal practice in Federal District Courts in entertaining bills to determine and declare the rights of non-resident citizens in and to estates and trust funds established in a long line of cases summarized by this court in the recent case of *Waterman vs. Canal-Louisiana Bank, &c., Co.*, 215 U. S. 33, at page 43.

WHEREFORE, your petitioners respectfully pray that a writ of *certiorari* be issued under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Circuit, sitting at the city of New York, commanding that court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Act of Congress approved March 3, 1911, known as the Judicial Code, and that the said judgment of the said Circuit Court of Appeals for the Second Circuit be reversed by this Honorable Court, and for such other and further relief as to this Honorable Court may seem meet.

And your petitioners will ever pray, etc.

JNO. A. S. BROWN,

FRANK E. SCHERMERHORN,

As Trustee for Clara Schermerhorn, Under the Last Will and Testament of Thomas Cunningham, Deceased.

CHARLES H. BURR,
Solicitor for Petitioners.

STATE OF PENNSYLVANIA, }
 COUNTY OF PHILADELPHIA, } ss.:

JOHN A. S. BROWN and FRANK E. SCHERMERHORN,
 as trustee for Clara Schermerhorn, under the last will
 and testament of Thomas Cunningham, deceased, being
 duly sworn, depose and say that they are the peti-
 tioners named in the foregoing petition by them sub-
 scribed and that the statements therein made are true,
 as they verily believe.

JNO. A. S. BROWN,
 FRANK E. SCHERMERHORN,

*As Trustee for Clara Schermer-
 horn Under the Last Will and
 Testament of Thomas Cun-
 ingham, Deceased.*

Sworn and subscribed be- }
 fore me this 8th day of }
 October, 1913.

GEORGE KOPPENHOEFER, JR.,
Notary Public,

328 Chestnut Street, Philadelphia, Pa.

My commission expires March 10, 1917.

[Seal]

I, CHARLES H. BURR, an attorney and counsellor-at-law, and a member of the bar of the Supreme Court of the United States, do hereby certify that I am solicitor for the petitioners named in the foregoing petition for a writ of certiorari, that said petition is not made for purpose of delay, but is meritorious and well-founded in law and should be granted.

CHARLES H. BURR.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE
SECOND DISTRICT.

John A. S. Brown, a citizen of the State of Pennsylvania, and Frank E. Schermerhorn, Trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, and a citizen of the State of Pennsylvania,

Complainants-Appellants,

vs.

Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York,

Defendant-Appellee.

To

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, the above named defendant-appellee.

Sir:

You are hereby notified that JOHN A. S. BROWN and FRANK E. SCHERMERHORN, trustee for Clara Schermerhorn, under the last will and testament of

Thomas Cunningham, deceased, the above named complainants-appellants, will, on Monday, the 27th day of October, 1913, upon their verified petition, and a copy of the entire record in this cause, at the opening of the Supreme Court of the United States, at its court room at the Capitol, in the City of Washington, D. C., on that day, submit to the said Supreme Court of the United States the foregoing motion and petition for writ of certiorari, true and correct copies of which are herewith delivered to you. Dated October 10th, 1913.

CHARLES H. BURR,
Solicitor for Petitioners.

Due service of the foregoing notice and delivery of a copy of the foregoing motion and petition for writ of certiorari and of petitioners' brief in support thereof, on the 11th day of October, 1913, is hereby admitted.

WILLIAM P. S. MELVIN,
Solicitor for Respondent.



Supreme Court of the United States

JOHN A. W. BROWN, a Counsel at Law, and
FRANK R. SCHENCK, a Counsel at Law, Petitioners,
Petitioners Under the Laws of the United States
Enacted Under the Act of Congress, Approved
March 3, 1907, Relating to the
Registration of Companies.

AUSTIN B. FLANNERY, a Representative of the
People of the State of New York, Under the Laws of the
United States Enacted Under the Act of Congress, Approved
March 3, 1907, Respondent.

In the Matter of the Appeal of John A. W. Brown and
Frank R. Schenck, Petitioners for Certiorari,
Under the Laws of the United States Enacted
Under the Act of Congress, Approved March 3, 1907,
Relating to the Registration of Companies, From the
District Court of Appeals for the Southern District of New York,
to the Supreme Court of the United States.

Filed at Petitioner's Request of Motion With
Petition for Writ of Certiorari as to Decree of
the District Court of Appeals for the
Southern District of New York.

CHARLES H. DUFF

Counsel for John A. W. Brown
and Frank R. Schenck
New York, New York

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IN THE
Supreme Court of the United States.

— Term, 191 . No. —.

JOHN A. S. BROWN, A CITIZEN OF THE STATE OF
PENNSYLVANIA, AND FRANK E. SCHERMER-
HORN, TRUSTEE FOR CLARA SCHERMERHORN,
UNDER THE LAST WILL AND TESTAMENT OF THOMAS
CUNNINGHAM, DECEASED, AND A CITIZEN OF THE
STATE OF PENNSYLVANIA,

Petitioners,

vs.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE
OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL
AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED,
AND A CITIZEN OF THE STATE OF NEW YORK,

Respondent.

IN THE MATTER OF THE APPEAL OF JOHN A. S. BROWN
AND FRANK E. SCHERMERHORN, TRUSTEE FOR CLARA
SCHERMERHORN, UNDER THE LAST WILL AND TES-
TAMENT OF THOMAS CUNNINGHAM, DECEASED, TO
THE CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT FROM THE DECREE OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE SOUTHERN DISTRICT
OF NEW YORK.

BRIEF OF PETITIONERS IN SUPPORT OF MO-
TION, WITH PETITION, FOR WRIT OF CER-
TIORARI TO BE DIRECTED TO THE
JUDGES OF THE CIRCUIT COURT OF AP-
PEALS FOR THE SECOND CIRCUIT.

PRELIMINARY STATEMENT.

The initial facts involved in this application are stated in the Petition for Certiorari which is presented herewith. It is unnecessary here to review these facts further than to say that the bill was filed by the petitioners, who are citizens of Pennsylvania, against the respondent, Austin B. Fletcher, as testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased, and a citizen of the State of New York, alleging that by virtue of an assignment from Conrad Morris Braker, the *cestui que trust* named in the will of the said Conrad Braker, Jr., and various *mesne* assignments, the petitioners are entitled to receive the sum of \$10,000 in the hands of respondent as testamentary trustee, which he neglects and refuses to pay.

The important points to be considered are:

I. The decision of the Circuit Court of Appeals that the District Court had no jurisdiction because the assignor of a trust fund could not have sued the trustee in a Federal Court on account of diversity of citizenship is directly opposed to the decision in *Ingersoll vs. Coram*, 211 U. S. 335, though under the facts of that case it cannot be distinguished therefrom.

II. The decision of the Circuit Court of Appeals that a claim by an assignee of the *cestui que trust* of a trust fund against the trustee is, in the Federal Courts, an action not of equitable jurisdiction, contravenes the long line of cases beginning with *Fowle vs. Lawrason*, 5 Peters, 495 (vide page 503) wherein it is held that, following the practice of the High Court of Chancery in England in 1789, jurisdiction exists "in all cases where a trustee is a party," to use the language of Mr. Chief Justice Marshall.

III. Two other points arising in the case do not require detailed examination in this place. A

brief consideration of the merits of each is, however, appended.

(A) By the decision of the Circuit Court of Appeals, Conrad Morris Braker, assignor of his entire interest in the estate of his father, is a necessary party to an action by his assignee to recover such interest.

(B) Even granted that Conrad Morris Braker, the original assignor, is a necessary party, it is urged that the bill should not have been dismissed but that an order should have been made that he be brought in by service of process.

These points will be considered in the order indicated.

ARGUMENT.

I.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT THE DISTRICT COURT HAD NO JURISDICTION BECAUSE THE ASSIGNOR OF A TRUST FUND COULD NOT HAVE SUED THE TRUSTEE IN A FEDERAL COURT ON ACCOUNT OF DIVERSITY OF CITIZENSHIP IS DIRECTLY OPPOSED TO THE DECISION IN *INGERSOLL VS. CORAM*, 211 U. S. 335, THOUGH UNDER THE FACTS OF THAT CASE IT CANNOT BE DISTINGUISHED THEREFROM.

The point was fully considered by Judge Hand of the District Court in the case at bar, in his opinion on demurrer, and the argument is there so clearly stated and is so convincing that it adopted as the argument of the petitioners upon this point. Judge Hand said (Record pages 75-76):

“On reading the bill I find that the New York Finance Company, the intermediate assignor, was a New York corporation and the question therefore arises whether the claim is a ‘Chose in action’ under Section 24 (1) of the Judiciary Code. The original assignor was Braker, who assigned to Rabe, who assigned to the New York Finance Company, who assigned to complainant. At the time of his assignment Braker was cestui que trust of a fund, or rather part of a fund of fifty thousand dollars which had been paid to a trustee for his benefit under the terms of his father’s will. I think it especially of importance to remember that the trustee no longer remained a legatee of the estate, he had paid the whole legacy bequeathed to him by the will, and he held it in trust for Braker, though the terms of the trust were to be found in the will. The question is whether the interest of a cestui que trust on a sum of money held for him by a trustee is a chose in action within the section named. In strict legal theory that is no doubt the case, the

"trustee has the entire title and the cestui que
 "trust only the right to call him to account; he
 "has no right to the *res* whatever, his sole right is
 "in *personam* against the trustee. Such certainly
 "is the better and in my judgment the only theory,
 "but it is by no means consistently grasped or
 "understood in the decisions, nor is it necessary
 "to base a decision upon it. Whatever be in
 "theory the relation of the cestui que trust to the
 "property, I do not think that his interest is what
 "the statute meant by a chose in action. There ap-
 "pears to be no authority upon the subject, though
 "Mr. Justice McKenna—in *Ingersoll* against Cor-
 "am, 211 U. S. 336, doubted whether even the dis-
 "tributive share of a legatee was a chose in action.
 "That case turned in respect of jurisdiction upon
 "another point but the doubt is significant since
 "the distributive share is certainly much more
 "ambulatory, less *in rem* so to speak than the
 "right of a cestui que trust in a separate fund. In
 "respect of real estate we are all familiar with
 "'Equitable estates' and the Supreme Court has
 "even said that a court of equity looked upon a
 "cestui que trust as seized of the estate *deu ex*
 "*dem*.

"Croxall vs. Sherard, 5 Wall. 268. -

"In respect of personal property also the
 "cestui que trust is entitled to possession of the
 "*res* unless its nature precludes; in short he is en-
 "titled at least on a case like this to all absolute
 "interest save the legal title and actual posses-
 "sion. It would be a piece of doubtful pedantry I
 "think in view of the usual meaning of the word
 "'chose in action' to apply it to a relation like
 "that created by the fourteenth paragraph of the
 "will"

It is respectfully submitted, however, that Judge
 Hand is in error in thinking that the decision in *Inger-*
soll vs. *Coram* is not an *express* decision, by virtue of
 the actual citizenship existing in that case, of the ques-
 tion now under discussion. In that suit *Ingersoll*, the

complainant (and her intestate) were citizens of the State of New York. The action was brought to subject certain interests in the estate of one Davis to a lien or equitable assignment alleged to have accrued to complainant's intestate by virtue of professional services rendered to claimants of Davis's estate. The funds sought to be so impressed were in the custody of Davis's administrator, John H. Leyson, a citizen of the State of Montana. Henry A. Root, one of the distributees and assignee of other distributees, was also a citizen of Montana. It was charged that the right of complainant's intestate was derived from Root and that, as Root could not have sued to establish his right to a share in the funds of the administrator, the latter and he being citizens of Montana, that the complainant was equally disqualified to establish and recover Root's share of the property. The argument was that the complainant was seeking to enforce a right of Root against the administrator arising on an equitable assignment and was thus seeking to recover as assignee of a *chose in action* upon which the assignor could not sue because his citizenship was the same as that of the administrator. In the face of this contention this Honorable Court decided that the Act of 1875 was not applicable, reversed the decree of the Circuit Court of Appeals and affirmed that of the Circuit Court in favor of the petitioner, complainant in the action. *It therefore followed that Root, the assignor, could not have brought the suit which Ingersoll, the assignee, brought, if the doctrine asserted by the learned Circuit Court of Appeals was applicable to such a case.*

The opinion of the Circuit Court of Appeals seeks to distinguish this case from the present one in these words:

“The complainants are not asserting a lien
“in their own right upon Braker's interest in the
“decendent's estate, as was the case in Ingersoll

"vs. Coram, 211 U. S. 336, but are asserting "Braker's title to the sum of \$10,000 to which "they say they have succeeded." (Record, page 365.)

It is difficult to understand precisely what is the distinction here meant to be suggested. In both cases the bill was filed to have declared a lien on a fund held in one case by an administrator and in the other by a testamentary trustee. The lien sought to be established by Ingersoll and his wife was a lien upon an interest in the estate of a decedent in the hands of his administrator, an equitable assignment of such an interest, where the assignor and the holder of the fund were citizens of the same state. The complainant in the Ingersoll case was just as much or as little, it is respectfully urged, "asserting a lien in her own right" as are the petitioners in the case at bar.

Attention is also called to the case of *Bertha Zinc and Mineral Co. vs. Vaughan*, 88 Fed. 566 (1898). There, one Black, having died intestate, his administrators obtained a judgment which formed the larger part of his estate. Prior to the receipt of the amount of the judgment by the administrators, a daughter of the decedent, one Candice Nelson, assigned all of her interest in the estate and the interest then passed by *mesne* assignments to the complainant, who filed its bill to recover the daughter's distributive share. The defendants were all citizens of Virginia, and the complainant a New Jersey Corporation. The original assignor was also a citizen of Virginia, as were certain of the intermediate assignors. The court, in an able opinion, said:

"It (the case under discussion) is not founded
 "on a contract, nor brought to enforce a con-
 "tract, but to enforce obligations incurred by
 "administrators of an estate in their official
 "capacity, by a failure to properly discharge their

“fiduciary duties. A non-resident assignee, bringing suit of this character, is entitled to have the “same heard in this court.”

The facts in this case cannot be distinguished from the case at bar. Both it and *Ingersoll vs. Coram, supra*, show conclusively that an action by an assignee of an interest in the estate of a decedent or by an assignee of an interest in a trust fund to enforce a distributive share in such estate or trust fund, is justicible in the Federal Courts, where the requisite difference of citizenship between the plaintiff and the defendant exists, regardless of the citizenship of the assignor. The decision of the Circuit Court of Appeals is directly opposed to the principles laid down by both of these cases and its effect, it is respectfully submitted, is to deny to petitioners the benefit of those decisions.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT A CLAIM BY AN ASSIGNEE OF THE CESTUI QUE TRUST OF A TRUST FUND AGAINST THE TRUSTEE IS, IN THE FEDERAL COURTS, AN ACTION NOT OF EQUITABLE JURISDICTION, CONTRAVENES THE LONG LINE OF CASES BEGINNING WITH *FOWLE VS. LAWRASON*, 5 PETERS, 495 (*Vide* page 495) WHEREIN IT IS HELD THAT, FOLLOWING THE PRACTICE OF THE HIGH COURT OF CHANCERY IN ENGLAND IN 1789, JURISDICTION EXISTS "IN ALL CASES WHERE A TRUSTEE IS A PARTY," TO USE THE LANGUAGE OF MR. CHIEF JUSTICE MARSHALL.

No proposition of equitable procedure is more elementary than that which declares that equity has jurisdiction of all causes where the enforcement of a trust is involved. While this jurisdiction is rested upon the inability of the ancient common law to furnish full, adequate and complete relief, it is unnecessary to inquire how far the existence of a legal remedy affects the right to equitable relief, because the control of equity over all trust questions is fundamental and, in the Federal Courts, based upon that of the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789, and is not to be restrained other than by the Constitution and laws of the United States.

The principle is enunciated by this court in *Fowle vs. Lawrason*, 5 Peters, 495-503 (1831), where Mr. Chief Justice Marshall said:

"In all cases in which an action of account
"would be the proper remedy at law, and in all
"cases where a trustee is a party, the jurisdiction
"of a court of equity is undoubted. It is the ap-
"propriate tribunal."

Again in *Oelrichs vs. Spain*, 15 Wall. 211-228 (1872). This was a bill to enforce liability under cer-

tain injunction bonds. The parties complainant were the executors of one of the obligors on these bonds and the executor and devisee of one who made no claim for his own benefit but solely in trust for the benefit of the other complainant. It was insisted by the appellants that a suit on a bond against principals and sureties is, in its nature, a suit at the common law. Mr. Justice Swayne, in reply to this contention, said:

“There is an element of trust in the case
“which, wherever it exists, always confers juris-
“diction in equity.”

In *Clews vs. Jamieson*, 182 U. S. 461 (1901), the whole question is so clearly and concisely stated that your petitioners are content to rest their contention upon it. The controversy therein related to certain funds deposited by the complainants with the governing committee of the Chicago Stock Exchange to secure the performance of a certain contract between the complainants and others. Upon default by the latter, the complainants sought, by bill in equity, to compel the committee to repay these funds which the committee, while laying no claim thereto, refused to do on the ground of a dispute as to the ownership. Mr. Justice Peckham, after declaring that the committee “became a trustee of the fund charged with the duty of seeing that it was applied in conformity with the provisions creating it,” said:

“Pomeroy in his work on Equity Jurisprudence, second edition, instances, among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trusts.

“In volume one, at section 151, he says:

“The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chan-

'cellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace not only lands, but chattels, funds of every kind, things in action, and moneys.'

"All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. In this case, the committee, as trustee, was charged with the performance of some active and substantial duty in respect to the management and payment of the funds in its hands, and it was its duty to see that the objects of its creation were properly accomplished. The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law court cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest or estate of the *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the final relief, to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are entitled to share therein.'

1 Pom. Eq. Jur., Sec. 158.

"In cases where the equity doctrine of trusts has been extended so as to embrace other relations of a fiduciary kind, while it may not be said that a court of equity possesses exclusive jurisdiction, yet it is well settled that in such

“case there is so much of the trust character between the parties so situated that the jurisdiction of equity, though not exclusive, is acknowledged.

1 Pom. Eq. Jur., Sec. 157.

“In *Foley vs. Hill*, 2 H. L. Cas. 28, a question arose over that sort of relation which exists between a banker and his depositor, and it was held to be merely that of debtor and creditor. The court added, however, that, as between principal and factor, an equitable jurisdiction attached because the latter partook of the character of a trustee, and that ‘so it is with regard to an agent dealing with any property. . . . And though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction,’ and, therefore, equity has jurisdiction.

“In *Marvin vs. Brooks*, 94 N. Y. 71, it was held that an agent who had been entrusted with his principal’s money to be expended for a specific purpose might be required to account in equity, and that upon such an accounting the burden was upon him to show that his trust duties had been performed and the manner of their performance. The jurisdiction was placed upon the ground of a fiduciary or trust relation and it was held that a court of equity had jurisdiction over trusts and those fiduciary relations which partake of that character, and in such cases the right to an accounting is well established; but it was held that the existence of a bare agency was not sufficient. It must be an agency coupled with some distinct duty on the part of the agent in relation to funds or some specific property.

“In 2 Story’s Eq. Jur. (12th Ed.) it is stated, at section 975a, that in general a trustee is suable in equity in regard to any matters touching the trust.

“In *Oelrichs vs. Spain*, 15 Wall. 211, 228, the court remarked that there being an element of

“trust in the case, that element, wherever it
“existed, always confers jurisdiction in equity.

“That the governing committee could file a
“bill of interpleader against the complainants and
“the other defendants, alleging that each claimed
“the funds, or some portion thereof, and ask the
“court to determine which of the parties was en-
“titled to the same, furnishes no reason for ex-
“cluding the jurisdiction of equity in this case.”

(Page 479 *et seq.*)

The circumstances of the case just cited place it on all fours with the case at bar, and the ruling therein made it incumbent upon the Circuit Court of Appeals to sustain the equitable jurisdiction. In addition it is submitted that the bill was filed in accordance with the equitable principles laid down by, and the equitable practice followed in, the cases of:

Payne vs. Hook, 7 Wall. 425 (1868);
Byers vs. McAuley, 149 U. S. 608 (1893);
Ingersoll vs. Coram, 211 U. S. 335 (1908);
Waterman vs. Canal-Louisiana Bank, &c.,
Co., 215 U. S. 33 (1909).

In the last mentioned case, Mr. Justice Day said:

“From an early period in the history of this
“court cases have arisen requiring a considera-
“tion and determination of the jurisdiction of the
“courts of the United States to entertain suits
“against administrators and executors for the
“purpose of establishing claims against estates,
“and to have a determination of the rights of per-
“sons claiming an interest therein. And this
“court has had occasion to consider how far the
“jurisdiction in equity of the courts of the United
“States in such matters may be affected by the
“statutes of the states providing for courts of
“probate for the establishment of wills and the
“settlement of estates. We will not stop to
“analyze or review in detail all these cases, as

"they have been the subject of frequent and re-
 "cent consideration in this court. The general
 "rule to be deduced from them is that, inasmuch
 "as the jurisdiction of the courts of the United
 "States is derived from the Federal Constitution
 "and statutes, that in so far as controversies be-
 "tween citizens of different states arise which are
 "within the established equity jurisdiction of the
 "Federal Courts, which is like unto the High
 "Court of Chancery in England at the time of the
 "adoption of the Judiciary Act of 1789, the juris-
 "diction may be exercised, and is not subject to
 "limitations or restraint by State legislation es-
 "tablishing courts of probate and giving them jur-
 "isdiction over similar matters. This court has
 "uniformly maintained the right of Federal
 "Courts of Chancery to exercise original jurisdic-
 "tion (the proper diversity of citizenship exist-
 "ing) in favor of creditors, legatees and heirs to
 "establish their claims and have a proper execu-
 "tion of the trust as to them" (at p. 43).

The decision of the Circuit Court of Appeals, it is respectfully suggested, contravenes the long line of cases beginning with *Fowle vs. Lawrason*, *supra*, wherein it is held that jurisdiction exists "in all cases where a trustee is a party," and, if left unreviewed, will unsettle the universal practice in Federal District Courts in entertaining bills to determine and declare the rights of non-resident citizens in and to estates and trust funds established in a long line of cases summarized by this court in the recent case of *Waterman vs. Canal-Louisiana Bank, Etc., Co.*, from which the quotation last above made is taken.

III.

Two other points arising in the case do not require detailed examination in this place. A brief consideration of the merits of each is, however, appended.

(A) THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT CONRAD MORRIS BRAKER, ASSIGNOR OF HIS ENTIRE INTEREST IN THE ESTATE OF HIS FATHER, IS A NECESSARY PARTY TO AN ACTION BY HIS ASSIGNEE TO RECOVER SUCH INTEREST IS CONTRARY TO THE UNIVERSAL RULING OF THIS COURT AND FEDERAL COURTS IN GENERAL.

Conrad Morris Braker, it was asserted by the Circuit Court of Appeals, is a necessary party to this action. An examination of the facts involved will show the creation of a trust by the will of one Conrad Braker, Jr., in favor of his son, Conrad Morris Braker, the appointment of the respondent as testamentary trustee thereunder and the payment to him of the funds involved. It will further show that on June 13th, 1901, by a certain instrument in writing, duly proved and offered in evidence and found on pages 26-30 of the Record, Conrad Morris Braker, "granted, bargained, sold, assigned, transferred and set over" unto one Frank L. Rabe (complainants' predecessor in title), his heirs, executors, administrators and assigns, "*any and all my (his) estate, right, title and interest, of, in and to*" the said fund, and made an irrevocable power of attorney to the said Rabe, with full power of substitution, to demand, receive, etc., the said fund.

It is clear from this summary that Braker parted absolutely with his right and title to the entire fund sought by the petitioners. No relief is sought against him. He has no standing to object to payment in accordance with the terms of his own act. This is not a proceeding to set aside a conveyance. Braker has not sought to intervene. Yet the learned Circuit Court of Appeals says that he is a *necessary* party to the bill.

The Federal Courts have been uniform in holding that one who, prior to the commencement of a suit, has parted absolutely and entirely with his title to the property in controversy, while he may be a proper party, is not a necessary party thereto.

In *Harris vs. Johnston*, 3 Cranch, 311 (1806), which was an action of assumpsit for goods sold and on a promissory note given in payment, which note when delivered bore the endorsement of a third party, and had been subsequently assigned by the complainant, Mr. Chief Justice Marshall said:

“Upon principle, it would appear that such
“an action [for goods sold] could not be main-
“tained. The endorsement of the note passes the
“property in it to another, and is evidence that it
“was sold for a valuable consideration.”

“If after such endorsement, the seller of the
“goods could maintain an action on the original
“contract, he would receive double satisfaction.”
(At page 317.)

In *Land Company of New Mexico vs. Elkins*, 20 Fed. 545 (1884), the bill alleged the making of an agreement to purchase land, the purchase thereof and title taken in the name of defendant, that one Smoot, one of the original parties to the agreement, had paid his share therefor and then assigned to complainant under what the court held to be an executory agreement. The prayer was for a conveyance of Smoot's share and for an injunction. Smoot having been dismissed as a party on the ground that he was a resident of the District of Columbia, the other defendant moved to dismiss on the ground that Smoot was an indispensable party. The court said:

“If the complainant had acquired Smoot's in-
“terest in the lands by a transfer, absolute and
“fully executed, the latter would not be a neces-
“sary party to the controversy. *Blake vs. Jones*,

“3 Anst. 651. An assignor who has made an absolute assignment of his interest need not be a party to a suit by the assignee to enforce the equitable title acquired by the transfer against the third party, even when the former retains the legal title.” (At page 546.)

So in *Brissell vs. Knapp*, 155 Federal, 809 (1907), which was a bill to enforce a constructive trust in stock of a corporation made by the assignee of one who had deposited the stock under a pooling agreement, the court said, on demurrer:

“Longabaugh (the assignor) has no interest in the stock, either legal or equitable, as against complainant. It does not appear that he claims any, and if he were to make such a claim against complainant he would be estopped.”

“No relief is sought against Longabaugh. . . . He is not a necessary party to the cause of action set out in the pleadings.” (At page 814.)

Again, in *Fidelity & Deposit Company of Maryland vs. Fidelity Trust Company*, 143 Fed. 152 (1906), where the receivers of an insolvent insurance society assigned to complainant all of their rights in certain funds held by depositories of the society, the court said:

“The assignments made by the receivers . . . were absolute on their face and conveyed to the complainant whatever rights the Order of Chosen Friends or its receivers had in and to their claims against the defendants. The settlement agreement, it is true, provided that one-quarter of whatever amount should be recovered by the complainant . . . should go to the receivers in Maryland, but that is merely an executory agreement creating a right in the receiver of the order in Maryland. . . . The assignments made in pursuance of the agreement of settlement are absolute on their face. The Mary-

“land receiver of the order and the order itself
 “are, therefore, not essential or necessary parties. They may be proper parties, but that is
 “the utmost that can be claimed.” (At page 156.)

Two cases decided by this court are conclusive. The first of these is *Batesville Institute vs. Kaufman*, 18 Wall. 151, 154 (1873). This was a bill to enforce payment of a mechanics' lien. Certain builders having such a lien foreclosed and got judgment. They then assigned to a trustee in trust to pay certain debtors to whom they were indebted on promissory notes. The creditors assigned these notes and by endorsement thereon transferred all their right and interest in the deed of trust to Kaufman, the complainant, who filed his bill against the original owners of the building and their successors in title. In answer to the objection that the original assignors were necessary parties, Mr. Justice Hunt said:

“Hirsch & Adler [the original assignors] had
 “parted with their interest in the notes and in the
 “judgment, and by their assignment had vested
 “the entire title thereto in their assignees. The
 “sole right of recovery is in the latter parties;
 “and if equities exist between them and their
 “assignors, they are to be settled between them at
 “their convenience and in their own manner.
 “These defendants have no interest in that part
 “of the transaction.” (At page 154.)

The other citation is that of *Robertson vs. Carson*, 19 Wall. 94 (1873). It is submitted that the facts are so similar to those of the case at bar as to leave no room for doubt. A testator left his residuary estate to his executors in trust for his widow and children. These executors sold certain real estate and accepted in payment bonds secured by a mortgage. Subsequently, the purchasers sold the property to a firm, two members of which took title thereto for the others.

Payment was made in Confederate money. Two of the legatees (William and James Carson), assigned their rights under the will to their mother, the widow of the testator, the other beneficiary under the trust, who then filed a bill against the executors for an accounting and against the purchasers, etc., on the ground of failure of consideration. Mr. Justice Swayne said:

“The parties defendant made by the bill are
 “the executors, Robertson and Blacklock, and Mc-
 “Burney [present holder of the property], Elias
 “N. and W. J. Ball [the first mortgagor and his
 “surety] and William and James Carson [joint
 “legatees with the widow, to whom they had as-
 “signed]. Process was returned not found as to
 “William and James Carson and Elias N. Ball.
 “The two former having assigned all their rights
 “and interest to everything in controversy, it was
 “not necessary to make them parties. Nothing
 “more need be said in regard to them.” (At page
 104.)

It is believed that these decisions show that Conrad Morris Braker, *cestui que trust* under the will of his father, Conrad Braker, Jr., who transferred his entire right, title and interest in the trust estate to Frank L. Rabe, petitioners' predecessor in title, with a full and irrevocable power of attorney, who has made no effort to be joined as a party herein and against whom no relief is prayed, is not a necessary party hereto.

(B) EVEN GRANTED THAT CONRAD MORRIS BRAKER, THE ORIGINAL ASSIGNOR, IS A NECESSARY PARTY IT IS URGED THAT THE BILL SHOULD NOT HAVE BEEN DISMISSED, BUT THAT AN ORDER SHOULD HAVE BEEN MADE THAT HE BE BROUGHT IN BY SERVICE OF PROCESS.

In this connection the attention of the Court is directed to the fact that the objection as to parties was raised by respondent's demurrer, that this demurrer was overruled, that the judge who heard the case on the merits considered himself bound by the decision on demurrer and that not until the case reached the Circuit Court of Appeals was the defendant's contention sustained. The case does not come within the 43rd Equity Rule providing that, if the plaintiff shall not set down the objection for argument, but shall proceed to a hearing, the Court may then dismiss or allow an amendment upon such terms as justice may require. Objection was made by demurrer, the demurrer was argued and decided *against* the objection. There was no reason for complainants to amend in the lower court. Yet when the Circuit Court of Appeals decided the appeal and reversed the decision of the District Court no opportunity was given to petitioners to correct the alleged defect.

But even if the Circuit Court of Appeals did have *power* to dismiss, without prejudice, under the 43rd Equity Rule or by virtue of its general equity jurisdiction, it is submitted that under the practice followed by this Court in the cases of *Hunt vs. Wickliffe*, 2 Peters, 201 (1829); *House vs. Mullen*, 22 Wall. 42 (1874), and *Goodman vs. Niblack*, 102 U. S. 556 (1880), such power should not have been exercised, but the case should have been remanded with directions to allow complainants to amend their bill as they may be advised and, if they fail to do this within a reasonable time, to dismiss it without prejudice.

Hunt vs. Wickliffe, 2 Pet. 201 (1829), was a bill in equity to obtain a conveyance of lands of which the defendants had the legal title, but to which the plaintiffs claimed the equitable title. At the hearing the bill was dismissed with costs for want of parties. Said Mr. Chief Justice Marshall:

“As the plaintiffs claimed under a conveyance made in pursuance of a decree of a court of competent jurisdiction, we do not think their bill ought to have been dismissed. The Circuit Court ought to have given leave to make new parties; and on their failing to bring the proper parties before the Court, the dismission should be without prejudice.

“The decree of the Circuit is reversed, and the cause remanded; with directions that the plaintiffs have leave to amend their bill, and make new parties.” (At page 214.)

In *House vs. Mullen*, 22 Wall. 42 (1874), a bill in equity was dismissed on demurrer for want of or misjoinder of parties, the decree being in such form as to render it a bar to future suit by the complainant. On appeal the Supreme Court reversed and remanded, Mr. Justice Miller saying:

“If the decree had dismissed the bill without prejudice or had stated as the ground of dismissal the misjoinder of parties or want of interest in two of them, we would have affirmed it, but to prevent what may be a great injustice, we must reverse the present decree and remand the case, with directions to allow plaintiffs to amend their bill as they may be advised and if they fail to do this within a reasonable time, to dismiss it without prejudice.” (At page 47.)

The case of *Goodman vs. Niblack*, 102 U. S. 556 (1880), was a bill in equity by a judgment creditor to enforce the lien of his judgment, brought against the

administrator of his judgment debtor. After the judgment had been entered the decedent had assigned his property for the benefit of creditors, and the fund sought to be impressed with the lien was still in the hands of the assignees in insolvency, who were not made parties. The court below dismissed the bill on demurrer, on the ground that the assignees were necessary parties. On appeal this court reversed and remanded. Mr. Justice Miller said:

“If the decree of the Circuit Court had dismissed the case without prejudice for want of proper parties, we should have been bound to affirm it. But standing as it does now, it is a decision on the merits of the case and a bar to any other suit. It must, therefore, be reversed and remanded to that court. *If the complainant shall ask leave to amend his bill by making Cheever and Wiles [the assignees in insolvency] defendants, he should be permitted to do so, and proceed with his case. If he does not do this, a decree should be entered dismissing the bill for want of these parties and without prejudice to any other suit on the merits.*” (At page 563.)

The language of Judge Story in *Hoxie vs. Carr*, 12 Fed. Cas., No. 6802, page 746, 1 Sumn. 173 (1832), on this point is illuminating. Judge Story says:

“The nature of an abatement in equity [raised by an objection of want of parties] seems to have been misunderstood at the argument. It is not necessarily a destruction of the suit, like an abatement at law, where a judgment, *quod casetur*, is entered. *It is merely an interruption to the suit, suspending its progress, until the new parties are brought before the court; and if this is not done at the proper time, the court will dismiss the suit.*” (At page 747.)

It is submitted that by reason of the circumstances under which the question of parties was raised and de-

cided, first in favor of the petitioners and finally against them, they should have been allowed to bring in Conrad Morris Braker as a party (if indeed he was a necessary party), and not be compelled to institute a new action subject to the hardships and difficulties which have arisen since the institution of this suit, by which they would not be affected if the present action is sustained.

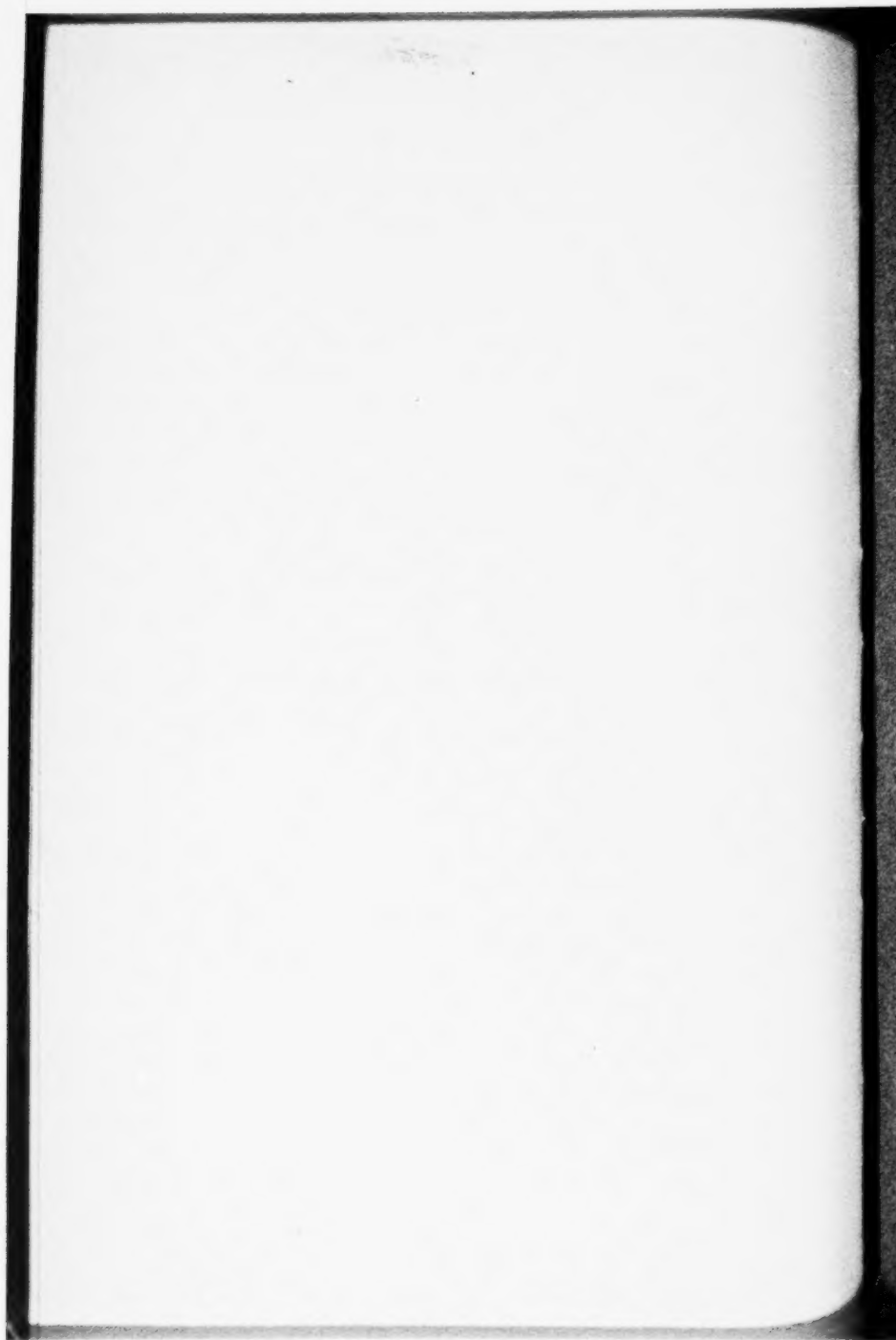
CONCLUSION.

In view of the fact that the questions involved in this case are *jurisdictional* questions, peculiarly within the cognizance of this Court, *from which, if decided by the District Court, where the decision was in favor of petitioners, the only appeal would have been to this Court*; that the decision of the Circuit Court of Appeals that the District Court had no jurisdiction because the assignor of a trust fund could not have sued the trustee in a Federal Court is in direct contravention of the decision in *Ingersoll vs. Coram, supra*; that the decision of the Circuit Court of Appeals that a claim by an assignee of the *cestui que trust* of a trust fund against the trustee is a claim *not* of equitable jurisdiction is opposed to a long line of cases where such jurisdiction was emphatically asserted, beginning with *Fowle vs. Lawrason, supra*, and, left unreviewed, will unsettle the universal practice in Federal Courts in entertaining bills to declare the rights of non-resident citizens in and to estates and trust funds summarized in *Waterman vs. Canal-Louisiana Bank, Etc., Co., supra*; that the decision of the Circuit Court of Appeals that the assignor of his entire interest in a trust fund, is a necessary party to an action by his assignee to recover such interest, is contrary to the decisions of this court and of the Federal Courts in general, decisions, the authority of which has never been questioned; and lastly that, admitting *arguendo* that such an assignor is a necessary party, the manner in which the question of parties was decided (in favor of the petitioners in the District Court and against them in the Circuit Court of Appeals), should have moved the Circuit Court of Appeals to remand, with instructions to permit the petitioners

to bring in the alleged necessary party; this Honorable Court is asked to exercise the authority given to it by section 240 of the Judiciary Act of March 3, 1911, and require this cause to be certified to it for its review and determination.

Respectfully submitted,

CHARLES H. BURR,
Attorney for Petitioners,
328 Chestnut Street,
Philadelphia.



No. 755.

OCT 24 1913

JAMES E. B. BROWN

IN THE SUPREME COURT OF THE UNITED STATES

JOHN A. B. BROWN and FRANK E. SCHERMERHORN as
trustees for CLARA SCHERMERHORN under the last will
and testament of Thomas Cunningham, deceased,
Petitioners,

vs.

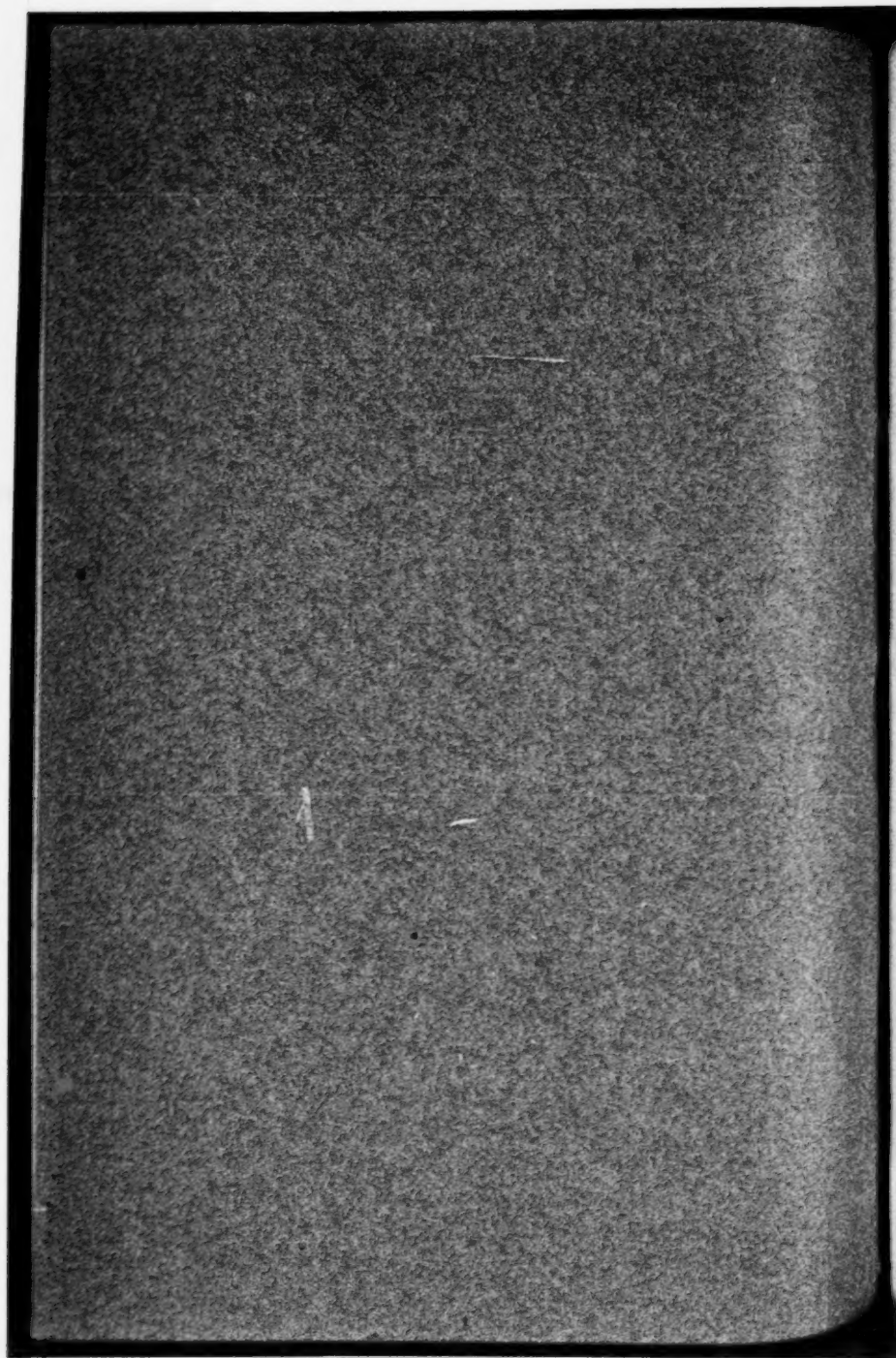
AUSTIN B. FLETCHER, as testamentary trustee of CONRAD
MORRIS BRAKER, under the last will and testament of
Conrad Braker, Jr., deceased,
Respondent.

In the Matter
of

The application of the Petitioners for the issuance of a Writ of
Certiorari to the United States Circuit Court of Appeals for
the Second Circuit requiring it to certify to the Supreme
Court the Record of the case of the Petitioners against the
Respondent.

BRIEF ON PART OF AUSTIN B. FLETCHER, RESPON-
DENT, IN OPPOSITION TO THE APPLICATION ON THE
PART OF THE PETITIONERS FOR A WRIT OF CERTI-
ORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.

WILLIAM P. S. MELVIN,
Solicitor for Respondent,
165 Broadway,
New York City.



IN THE

Supreme Court of the United States

In the Matter
of

The application of petitioners for the issuance of a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit to bring before the Supreme Court the Record of their suit against respondent.

STATEMENT.

This is a suit in equity brought by strangers to a trust to compel the payment to them by the trustee of the balance of a trust fund being administered by the trustee, amounting to the sum of \$10,000.

The suit was commenced before the present Judicial Code took effect, and the judgment rendered by the District Court consequent upon the hearing, was entered before the existing Equity Rules became operative.

The suit was brought by complainants, John A. S. Brown and Frank E. Schermerhorn, as trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, against Austin B. Fletcher, (sole defendant), as testamentary trustee of Conrad Morris Braker, under the last will and testament of Conrad Braker, Jr., deceased.

This will, by its fourteenth section, established a trust in favor of testator's son, Conrad Morris Braker. Under the trust a sum of \$50,000 was bequeathed to the trustee with instruction to pay the same in installments to the *cestui que trust* at certain times after the death of the testator. The last of these installments (one for \$10,000), became payable July 21, 1910, (Record, pp. 21, 22).

The trustee of this trust named in the will retired during its administration, and in his stead Austin B. Fletcher, the defendant, was appointed by order of the Surrogates' Court of the County of New York (Rec., par. fifth, page 3).

On the 13th day of June, 1901, the *cestui que trust*, Conrad Morris Braker, made a written assignment to one Frank L. Rabe, of his then remaining interests under said trust (pp. 26, 27, 28, 29).

The interests so assigned passed successively to others as follows:

FIRST.—The assignee, Rabe, by instruments dated October 1, 1901 and January 4, 1907, transferred the same to the New York Finance Company (pp. 36-41).

SECOND.—The New York Finance Company (Dec. 1, 1906) transferred the same by way of

pledge to the present complainants, Brown and Schermerhorn, as security for the payment on July 21, 1906, of its promissory note for \$10,000 (pp. 42-46).

THIRD.—Default having been made in the payment of said note, the payees, Brown and Schermerhorn, on May 3, 1911, essayed to sell the collateral at public auction, and Charles Z. Wolff became ostensibly the purchaser, and received a formal assignment on May 6, 1911, from Brown and Schermerhorn of all their interests (pp. 47-51).

FOURTH.—Upon the same day said Wolff re-assigned all such interests back to Brown and Schermerhorn.

The bill of complaint avers, at the close of the twenty-first paragraph, that the sum of \$10,000, the balance of said trust fund, is in the hands of the present trustee, that the *cestui que trust* became entitled under the will to receive and have paid over to him that balance; that by virtue of the said several assignments the complainants became vested with and entitled to receive said sum of \$10,000, and that the trustee neglects and refuses to pay it to them, notwithstanding their "reasonable request" therefor (pp. 12, 13). Upon these general allegations they ask to be declared entitled to the immediate possession of the sum and that the defendants be decreed, adjudged and directed to pay the same to them (ib.).

Judge Ward, commenting on this bill, says in his opinion (page 362), "there is no ground whatever of equitable jurisdiction stated in the bill, nor any equitable relief prayed for."

The defendant demurred to the bill (page 71), that complainants were not entitled to the relief prayed for; that by the bill they had an adequate remedy at law, and (besides other objections not at present insisted on), that the *cestui que trust* was a necessary party defendant. This latter objection is peculiarly pertinent in view of the fact that it nowhere appears in the bill that the trustee had notice of or assented to the various assignments alleged to have been made, nor is there any proof whereby he would be charged with even constructive notice of them. There is proof, however, that the *cestui que trust* brought suit against his assignee. Rabe, to have the assignment to him declared void, and also proof that the complainants were advised of the existence of such suit before the commencement of this action (pp. 182-208, 211, 212).

The demurrer was overruled, and the defendant was allowed to answer, and paragraphs V, VI and VIII thereof reiterate as defences, the objections raised by the demurrer (pp. 107, 108).

POINTS.

I.

TO REQUIRE THIS COURT TO ISSUE THE WRIT OF CERTIORARI THERE MUST BE IN THE CAUSE ELEMENTS OF GREAT PUBLIC CONCERN, OR OF NATIONAL IMPORTANCE OF CONFLICT OF APPELLATE COURTS UPON QUESTIONS OF GRAVE IMPORT.

Perhaps the most instructive expression of this Court respecting this writ and when it may be called upon to exercise its power in its issuance,

is that of *Forsyth vs. Hammond* (166 U. S., 506; 41 L. ed., 1095). There, Mr. Justice Brewer said:

"So it has been that this Court, while not doubting its power, has been chary of action in respect to certioraris. It has said: 'It is evident that it is solely questions of gravity and importance that the circuit courts of appeal should certify to us for instructions; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the court of appeals is made final, to be certified, can be properly invoked.' *Ex parte Lau Ow Bew*, 141 U. S., 583, 587 [35: 868, 870]; *Ex parte Woods*, 143 U. S., 202 [36, 125]; *Lau Ow Bew vs. U. S.*, 144 U. S., 47, 58 [36, 340, 344]; *Amer. Con. Co. vs. Jacksonville T. & K. Co.*, 148 U. S., 372, 383 [37: 486, 491].

* * * "And further that while this power is coextensive with all possible necessities, and sufficient to secure to this court a final control over the litigation in all the courts of appeal it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

In *Fields vs. United States*, 205 U. S., 292; 51 L. ed., 810, Mr. Justice Brewer, on an application for the writ to issue, reiterated his expressions. He said:

"In this case there is no sufficient ground for a certiorari. The application comes within none of the conditions therefor declared in the decisions of this court. However important the case may be to the applicant, the question involved is not one of gravity and general importance. There is no conflict between decisions of state and Federal courts, or between those of Federal courts of different circuits. There is nothing affecting the relation of this nation to foreign nations, and, indeed, no matter of general interest to the public."

Looking at the case at bar in the light of these decisions, the fact must be recognized that there is no question here of general importance or gravity, neither is there a conflict of courts. The only grounds upon which the petition is based are two: first, that the case of *Ingersoll vs. Coram* (211 U. S., 336) was not properly considered by the Circuit Court of Appeals, as determinative of the controversy; and, second, that the Court erroneously viewed the case as one brought in equity where there was a plain, adequate and complete remedy at law.

The minor reason, stated on page 15 of petitioners' brief does not merit attention. This Court will confine itself to the grounds set forth in the petition.

Hubbard vs. Tod, 171 U. S., 474; 43 L. ed., 256.

II.

THE DISCRETIONARY POWER OF ISSUING A WRIT OF CERTIORARI WILL NOT BE EXERCISED BY THE

SUPREME COURT TO REVIEW A DECISION OF THE
CIRCUIT COURT OF APPEALS WHERE THE ONLY
DIFFERENCE THAT CAN RESULT WOULD BE TO AF-
FIRM THE DISMISSAL WITHOUT PREJUDICE.

Smith vs. Vulcan Iron Works, 165 U. S.,
518; 41 L. ed., 810.

III.

THE COMPLAINANTS, BEING THE ASSIGNEES OF A
CHOSE IN ACTION, SHOULD HAVE SHOWN BY THE
BILL OR IN THE RECORD WHAT WAS THE PLACE
OF CITIZENSHIP OF THE ASSIGNOR AT THE TIME
OF THE INSTITUTION OF THE ACTION: THE
DISTRICT COURT COULD NOT TAKE COGNIZANCE
OF THE SUIT, UNLESS IT APPEARED THAT IT
MIGHT HAVE BEEN PROSECUTED IN THE COURT
WERE NO ASSIGNMENT TO HAVE BEEN MADE.

There is an omission to state in the Bill of Com-
plaint of what State the assignor, Conrad Morris
Braker, was a citizen at the time of the commence-
ment of this action. Such an allegation was es-
sential.

N. Amer. Tr. Co. vs. Morrison, 178 U. S.,
262; 44 L. ed., 1061.

Brock vs. N. West Fuel Co., 130 U. S.,
341; 32 L. ed., 905.

22 Ency. Pl. & Pr., sub nom. "U. S.
Courts," 262, and many cases cited.

The Court has no jurisdiction of this action.

The Bill of Complaint shows upon what Brown
and Schermerhorn base their claim,—namely, upon

the possession of an assignment over to them from Wolffe of Braker's interest in the trust fund, of an assignment originally made by Conrad Morris Braker to Rabe, and successively assigned to the New York Finance Co., to Messrs. Brown and Schermerhorn, to Wolffe, and finally, by the latter, back again to Brown and Schermerhorn.

The second defense set up by answer of defendant alleges that the Court has not cognizance of this suit, inasmuch as Conrad Morris Braker was, at the time of the commencement of the action, a citizen of the State of New York and could not prosecute the suit in this Court, if no assignment had been made.

There is no proof offered in the case, on the part of the defendant, of Braker's citizenship, but the allegation and proof of that fact is primarily cast upon the complainant.

In *Bradley vs. Rhines* (8 Wall. 393; 19 L. ed., 469) Justice Miller says:

"We take the doctrine to be settled that when a party claims in the Federal Courts, through an assignment of a *chose in action*, he must show affirmatively that the action might have been sustained by the assignor if no assignment had been made" (referring to *Mollan vs. Torrense*, 9 Wheat., 537; *Bank of U. S. vs. Moss*, 6 How., 31).

The law as to this feature of the Court's jurisdiction, was first announced by Sec. 11 of the Judiciary Act of 1789 (Stat. at Large, 78, Ch. 20), as follows:

"Nor shall any District or Circuit Court have cognizance of any suit to recover the con-

tents of any promissory note or other chose in action in favor of an assignee, unless such suit might have been prosecuted in such court to recover the said contents, if no assignment had been made."

This statute was re-enacted in Sec. 629 of the Revised Statutes with slight modifications, as follows:

"The Circuit Courts shall have original jurisdiction as follows:

FIRST.—Of all suits of a civil nature at common law or in equity. * * * *Provided*, That no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

Thus the law remained until 1875, when it was changed to read as follows:

"Nor shall any Circuit or District Court have cognizance of any suit founded on a contract in favor of an assignee unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes, negotiable by the law merchant and bills of exchange."

But the Act of 1875 was amended and the law was restored to practically the form in which it

originally stood in 1789. This last amendment was made by the Acts of March 3, 1887, and of August 13, 1888, and is as follows:

“Nor shall any circuit or district court have cognizance of any suit, except upon foreign bills of exchange, to recover the contents of any promissory note or other chose in action, in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made.”

Such was the condition of the law at the time the present action was instituted and when the demurrer was filed; when the answer was filed the law had been again amended by the Judicial Code. The changes are, however, by way of reconstruction,—the text is substantially the same.

While the Judicial Code (Sec. 297) repeals all the laws above referred to, it provides (Sec. 299) that the repeal “shall not affect any act done, * * * or any suit or proceeding * * * pending at the time of the taking effect of this Act, but all such suits may be prosecuted * * * with the same effect as if said repeal * * * had not been made.”

It may be said, then, that the jurisdiction of the Court is unchanged. The change in construction is simply designed to clarify.

When the objection to the Court's jurisdiction was first urged by the demurrer, Mr. Justice Learned Hand, in overruling the demurrer (see his opinion, Record, page 75), conceded that upon the question whether the interest of the *cestui que trust* in the sum of money held for him by the

trustee, was or was not a *chose in action* under Sec. 24 of the Judiciary Code,—such was no doubt the case “*in strict legal theory*,” but he said that he did not think the *cestui que trust*’s “interest is what the statute meant by a *chose in action*,” and he thought that in view of the usual meaning of the term, “it would be a piece of doubtful pedantry” to apply it to a relation like that created by the will in the establishment of the trust.

As used in the statute, there are no accompanying expressions whatever delimiting the breadth of the term “*chose in action*.” We submit that Congress in framing the law did not design to lessen, or qualify, or restrict the significance of those words; on the contrary, their purpose was not to minimize, but to adopt a word of great scope, and the great aim of the statute was to prevent, as far as possible, the entertainment of any suits in the Federal Courts, other than those strictly arising between citizens of different states, apprehending that unless such care were taken, the courts would be overborne by the volume of suits cunningly brought before them by force of assignments more specious than real. The legislators were concerned that the jurisdiction of the Court should be such as to bar out all others than genuine assignments between citizens of different states.

Bushnell vs. Kennedy, 76 U. S., 387; 19 L. ed., 736.

Under the head “*chose*,”—“*choses in action*,” Bouvier in his Law Dictionary, gives us as definition—

"Personal things, of which the owner has not the possession, but merely a right of action for their possession."

And he refers to 2 Blackstone Comm., 389, 397. In Blackstone we read:

"Property in chattels personal may be either *in possession*, which is where a man hath not only the right to enjoy but hath the actual enjoyment of the thing; or else, it is *in action* where a man hath only a bare right without any occupation or enjoyment."

Book 2, 389.

Again he says:

"We will proceed next to take a short view of the nature of property *in action*, or such where a man hath not the occupation but merely a bare right to occupy the thing in question, the possession whereof may, however, be recovered by a suit or action at law; from whence the thing so recoverable is called a thing or *chose in action*."

Book 2, 397.

A *chose in action*, or a thing in action, is a term used in contradistinction to a chose, or thing, in possession.

Ayres vs. West R. R. Co., 48 Barb., 135.

A *chose in action* includes all rights to personal property not in possession, which may be enforced by action.

Gillett vs. Fairchild, 4 Den., 80.

"It is a right of proceeding in a court of law to procure the payment of a sum of money. The term is used in contradistinction to choses in possession, which were chattels of which one is in possession or control, such as corn, wheat, books and the like.

One view has restricted the term to rights of action for money arising under contract, but while it comprehends these, whatever the contract, it is undoubtedly of much broader significance, and includes the right to recover pecuniary damages for a wrong afflicted either upon the person or property."

Citing—

Gillett vs. Fairchild, *supra*;

McKee vs. Judd, 12 N. Y., 622;

Wms. Pers. Prop., 4;

3 Amer. & Eng. Encyc. Sub. Tit. "Choses in Action," 236.

The right to sue for a trust fund misapplied by the trustee is an *equitable chose in action* (id.).

Whether the term should be limited to rights of action arising under *contracts* is disposed of by the fact that the amendment of the statute in question made in 1875, containing such a limitation, was abrogated by the amendments of 1887-9 restoring the law to its original character.

When we come to examine the authorities of the Federal courts is construction of what is a *chose in action* under the statute, the first expression perhaps is that of Chief Justice Marshall in *Sere vs. Pitot*, 6 Cranch, 332, 335. He says:

“Without doubt assignable paper being the chose in action most usually transferred was in the mind of the legislature when the law was framed, and the words of the provision are therefore best adapted to that class of assignments. But there is no reason to believe that the legislature was not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of the equitable assignments and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity, in his own name; and there would be as much reason to exclude him from the federal courts as to exclude the same person when the assignee of a particular note. The term ‘other chose in action,’ is broad enough to comprehend either case.”

In *Sheldon vs. Sill*, 49 U. S., 441; 12 L. ed. 1147 to 1151, Judge Grier says:

“The term ‘chose in action’ is one of comprehensive import. It includes all the infinite varieties of contracts, covenants and promises which confer on one party a right to recover a personal chattel or a sum of money by action.”

In *Corbin vs. Black Hawk Co.* (105 U. S., 659; 26 L. ed. 1136), which was a suit for the specific performance of contract for the purchase of land, Judge Blatchford said that such a suit must be regarded as one to recover the contents of a con-

tract as a chose in action, and so not maintainable by an assignee if it could not have been prosecuted had no assignment been made. Equitable as well as legal assignments are included.

"The contents of a contract as a *chose in action* in the sense of Sec. 629 are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract; and a suit to enforce such stipulation is a suit to recover such contents. The promise to pay money contained in a promissory note is all that there is of the note. A suit to enforce the payment of the money is a suit to recover the contents of the note, because there is nothing contained in the note but the promise."

It was held, *Shoecraft vs. Bloxham* (124 U. S., 730; 31 L. ed. 574), that a suit to enforce the performance of a contract is a suit to recover the contents of a *chose in action*. And the Court said that the terms used in the statute "the contents of any promissory note, or other chose in action" were designed to embrace the rights the instrument conferred which were capable of enforcement by suit. They were not happily chosen to convey the meaning, but they have received a construction substantially to that purport in repeated decisions of this court. They were so construed in the recent case of *Corbin vs. Black Hawk Co.*, 105 U. S., 659; 26 L. ed. 136, where the subject is fully considered and the decisions recited."

A *chose in action* is defined to be "the interest in a contract which in case of non-performance can

only be reduced into beneficial enjoyment by an action or suit."

Haskell vs. Blair, 57 Mass., 534, 536.

A life insurance policy has been held to be a chose in action,

21 Ind. App., 525,

even before the death of the insured.

Steele vs. Gatlin, 115 Ga., 929.

A chose in action is said to be a thing not in occupation or enjoyment, but merely a bare right to be recovered by an action, hence its name.

U. S. vs. Moulton, 27 Fed. Cas., 11, 12.

The Ingersoll case (Ingersoll vs. Coram, 211 U. S., 336), upon which so much stress is laid by the petitioners will be found on criticism to vary greatly from the present. That action was not based upon an assignment of a *chose in action*. It was an action brought upon a contract of employment to have an attorney's lien declared and foreclosed upon property realized because of the litigation following the employment. The facts were simply that Andrew J. Davis, a wealthy man, died and by his will left all his property to his brother. Certain of his next of kin united to contest the probate of the will. Two of these agreed with their associates to conduct and finance the litigation in the interest of all, receiving therefor an assignment of part of the outcome that might

be secured for the others. Those two made a bargain with Col. "Bob" Ingersoll for his professional services agreeing that if the will were set aside his fee should be \$100,000. Pending the litigation a compromise, however, was effected, and, as a result, it was claimed that an equitable lien in favor of Ingersoll and his legal representatives attached to the interests of the contestants and that the assets in Massachusetts should be subject to the debt growing out of Ingersoll's employment. The suit then was one to declare and foreclose a lien upon the property of the decedent distributable to the contestants. The syllabus of the case itself presents the distinction. It states that where the plaintiff is suing *primarily upon an obligation* to secure which a lien was given upon a distributive share of an heir's interest in an estate, it is not within the statute governing federal jurisdiction of suits by assignees of *choses in action*. In our case the plaintiffs are suing upon and by virtue of the assignment itself. The suit is not to declare and enforce a lien upon a distributive share of an estate.

Mr. Justice Ward in our case says (see opinion, page 365) :

"The complainants are not asserting a lien in their own right upon Braker's interest in the decedent's estate, as was the case in *Ingersoll vs. Coram*, 211 U. S., 336, but are asserting Braker's title to the sum of \$10,000.00 to which they say they have succeeded. This is clearly a chose in action, that is a claim not in possession, but which must be enforced by an action against the trustee, *Sheldon vs. Sill*, 49 U. S., 441. As their assignors could not maintain an action in the District Court,

the complainants cannot, Act March 3rd, 1875, Sec. 1."

The petitioners ask the attention of the Court to the case of *Bertha Zinc and Mineral Co. vs. Vaughan* (88 Fed., 566) and make the bold assertion that this case cannot be distinguished from the case at bar. On the contrary there are no features of similarity. The judge who decided that case said that the suit is not one that arises upon contract of the original parties. The suit is in effect one against the administrators and their sureties on their official bond for a devistavit. It is not founded on a contract nor brought to enforce a contract, but to enforce obligations incurred by administrators of an estate in their official capacity by a failure to properly discharge their fiduciary duties, and he referred to the case of *Ambler vs. Eppinger* (137 U. S., 480; 34 L. e., 765) as determinative, which held that an action for damages for trespass brought by an assignee of the claim was not within the statute of March 3, 1887.

IV.

THE INTIMATION MADE IN THE PETITION AND BRIEF THAT THIS SUIT IS BROUGHT TO IMPRESS OR SECURE A LIEN ON THE FUND IS ALTOGETHER MISLEADING. SO, TOO, THE ASSERTION THAT JUDGE WARD DECIDED AS A GENERAL PROPOSITION OF LAW THAT A CLAIM AGAINST A TRUSTEE BY AN ASSIGNEE OF A TRUST FUND IS NOT OF EQUITABLE JURISDICTION,—IS A DISTORTION OF THE TERMS OF THE JUDGE'S OPINION. THE FEATURES OF THE BILL, HOWEVER DISGUISED, SHOW THAT IT IS AN ACTION AT LAW.

The petition on this application, in its allegation (page 2) that complainants prayed by their bill, that they might have their rights to the said sum of \$10,000, declared,—is scarcely a correct statement. The prayer of the bill (Record, page 13) is that plaintiffs “may be declared entitled to the immediate possession of the said sum of \$10,000, and the trustee may be decreed, adjudged and directed to pay to your orators the said sum * * * so due and payable to them, as hereinbefore particularly alleged and set forth.”

So, in commenting on the case of *Coram vs. Ingersoll* in their Brief (page 7) they declare that the bill in both that case and in the case at bar were filed for the purpose of having a lien declared on the fund in one case by an administrator and in the other by a testamentary trustee. But on examining the bill here, such a purpose is not disclosed.

Judge Ward well said (Rec., page 362) after an inspection of the bill:

“It alleges that by virtue of an assignment from Conrad M. Braker and various mesne assignments, the complainants are entitled to receive the sum of \$10,000 in the hands of the defendant as testamentary trustee which he neglects and refuses to pay. The prayer for relief is that the defendant may be decreed to pay the said sum over to the complainants.”

It may be said without fear of challenge that circumstances may be such that a trustee may sue and be sued at law. This action of complainant's is not based upon any fiduciary relation ex-

isting between the trustee, Austin B. Fletcher and themselves. It is not brought for the enforcement of a trust. The trustee as such owes no duty to them under his trust. It is based simply upon the contract of assignment made by Braker to Rabe and which finally passed into their possession, The time arrived for the payment of the money and they sued for it under their assignment. The suit is possessory in its character. The bill is clothed in the garb attaching to an equitable one, but, in truth, it should be one at law.

A proceeding, in form a Bill in Equity, but, which is in substance a possessory action involving the title to real estate is properly dismissed.

Thomas vs. Hukill, 131 Pa., 298.

An illuminative case is that of *Whitehead vs. Shattuck*, (138 U. S., 146, 34 L. ed., 873) and it will be observed that in the case cited the plaintiff sues as trustee. In this case Mr. Justice Field says :

“And so it has been held by this Court ‘that whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment, which affords a plain, adequate and complete remedy without the aid of a Court of Equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury.’ *Hipp vs. Babin*, 60 U. S., 19 How., 270, 278 [15, 633, 635].

“It would be difficult and perhaps impossible to state any general rule which would determine in all cases what should be deemed a

suit in equity as distinguished from an action at law, for particular elements may enter into the consideration which would take the matter from one court to the other: but this may be said, that where the action is simply for the recovery and possession of specific real or personal property, or for the recovery of a money judgment, the action is one at law."

It has been held that when all that remains to be done with reference to a trust fund is the payment of an ascertained sum, the beneficiary may sue his trustee *at law* for money had and received or to recover the trust fund.

22 Ency. Pl. & Pr., 138;
 McCrea vs. Purmont, 16 Wend., 460;
 Varet vs. N. Y. Ins. Co., 7 Paige, 560;
 N. Y. Ins. Co. vs. Roulet, 24 Wend., 505;
 Tateum vs. Ross, 150 Mass., 440;
 Webb vs. Faller, 77 Me., 568.

After the termination of a trust, *assumpsit* lies to recover money in the trustee's hand.

Underhill vs. Morgan, 33 Conn., 105;
 Howard vs. Tatterson, 72 Me., 57;
 Frost vs. Redford, 54 Mo. App., 345;
 Lynde vs. Davenport, 57 Vt., 597.

Of course, the assignee of a trust fund occupies relatively the same position as the *cestui que trust*, who has made the assignment; and if the latter may sue at law for the recovery of the money, surely the assignee may do so.

In bringing suit the assignee may now generally sue in his own name *at law*. Equity will not, as a rule, entertain a bill simply to recover the debt.

Bisphams Eq., 227, 4th Ed.

Story Eq. Jurisp.

Chic. R. R. vs. Nichols, 57 Ill., 466.

Hayward vs. Andrews, 106 U. S., 672; 27 L. ed., 271.

Guaranty Co. vs. Water Co., 107 U. S., 205; 27 L. ed., 484.

Goodwin vs. Lloyd, 8 Port. (Ala.), 237.

Dickenson vs. Burr, 15 Ark., 372.

Batchelder vs. Jenness, 59 Vt., 104.

The right of the assignee of a *chose in action* to sue at law furnishes to him such a plain and adequate remedy as will preclude him from filing a bill in equity or from obtaining relief therein, in the absence of any allegation to show that he had no adequate or complete remedy at law. There must be some allegation showing that the assignment was denied by the assignor, or that the assignor claimed the fund in question, or that he, in some way, objected to payment, or that there is a controversy between the assignor and the assignee.

Angel vs. Stone, 110 Mass., 54.

When the equitable title is not involved in the litigation and the remedy is sought merely for the purpose of enforcing the legal right of the assignor, *there is no ground for an appeal to equity*, because the disputed right may be perfectly vindicated in an action at law. From this it follows, as a general rule, that *unless special circumstances render it necessary for the assignee to go into a court of equity to prevent a failure of justice*, the mere fact of the assignment, or the fact that the interest of the assignee is an *equitable one*, will not give him a right to invoke the jurisdiction of a court of equity.

N. Y. Guaranty Co. vs. Water Co., 107 U. S., 214; 27 L. ed., 484.

Glenn vs. Marbury, 145 U. S., 499; 31 L. ed., 790.

Hayward vs. Andrews, 106 U. S., 672; 27 L. ed., 271.

VII Ency. Pl. & Pr., 742.

The assignee of a *chose in action*, as a patent right, with claims of damages for its infringement, cannot proceed by bill in equity to enforce for his own use the legal right of his assignor, merely because he cannot sue at law in his own name; he has a plain and adequate remedy by an action in the name of his assignor.

Hayward vs. Andrews (106 U. S., 672; 27 L. ed., 271).

Justice Matthews in this case said that the simple question was whether the assignee of a *chose in action* may proceed by bill in equity to enforce for his own use the legal right of his assignor, merely because he cannot sue at law in his own name. He refers to Walker vs. Brooks (125 Mass., 241) to the effect that "a court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy."

So, too, in New York Guaranty & Ind. Co. vs. Memphis Water Co. (107 U. S., 205; 27 L. ed., 484), the rule that an assignee of a *chose in action* or any other *cestui que trust* cannot, merely be-

cause his interest is an equitable one, proceed in a court of equity for the recovery of a demand, was enforced, following the decision in *Hayward vs. Andrews*, *supra*.

Justice Bradley referred to that case and the decision therein, reiterating the rule that the assignee of a *chose in action* on which an adequate and complete remedy at law exists, cannot, merely because as such assignee his interest is an equitable one, bring a suit in equity for the recovery of the demand. He declared that such an assignee must bring an action at law in the name of the assignor to his own use. "This," he said, "is true of all legal demands standing in the name of a trustee and held for the benefit of *cestuis que trust*,—and the Judge refers to many cases besides those mentioned in *Hayward vs. Andrews*. And, speaking of the incorporation by Congress in the Judiciary Act of the rule adverse to the maintenance of suits in equity where there is a complete remedy at law, he says: "This enactment certainly means something, and if only declaratory of what was always the law, it must at least have been intended to emphasize the rule and to impress it upon the attention of the courts."

V.

THE APPLICATION FOR THE WRIT OF CERTIORARI
SHOULD BE DENIED, WITH COSTS.

Respectfully submitted,

WILLIAM P. S. MELVIN,
Solicitor for testamentary
trustee, Austin B. Fletcher.

APR 4 1914

JAMES D. MAHER
CLERK

No. ~~700~~ 286

12 October Term, 1913.

IN THE
Supreme Court of the United States

JOHN A. S. BROWN, a Citizen of the State of Pennsylvania, and FRANK E. SCHERMERHORN, Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, Deceased, a Citizen of the State of Pennsylvania,

Petitioners,

v.

AUSTIN B. FLETCHER, as Testamentary Trustee of Conrad Morris Braker, Under the Last Will and Testament of Conrad Braker, Jr., Deceased, and a Citizen of the State of New York,

Respondent.

Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

MOTION TO ADVANCE.

CHARLES H. BURR,
Solicitor for Petitioners.

No. 786

Supreme Court

No. 766.

October Term, 1913.

IN THE
Supreme Court of the United States.

JOHN A. S. BROWN, A CITIZEN OF THE STATE OF PENNSYLVANIA, AND FRANK E. SCHERMERHORN, TRUSTEE FOR CLARA SCHERMERHORN, UNDER THE LAST WILL AND TESTAMENT OF THOMAS CUNNINGHAM, DECEASED, A CITIZEN OF THE STATE OF PENNSYLVANIA,

Petitioners,

v.

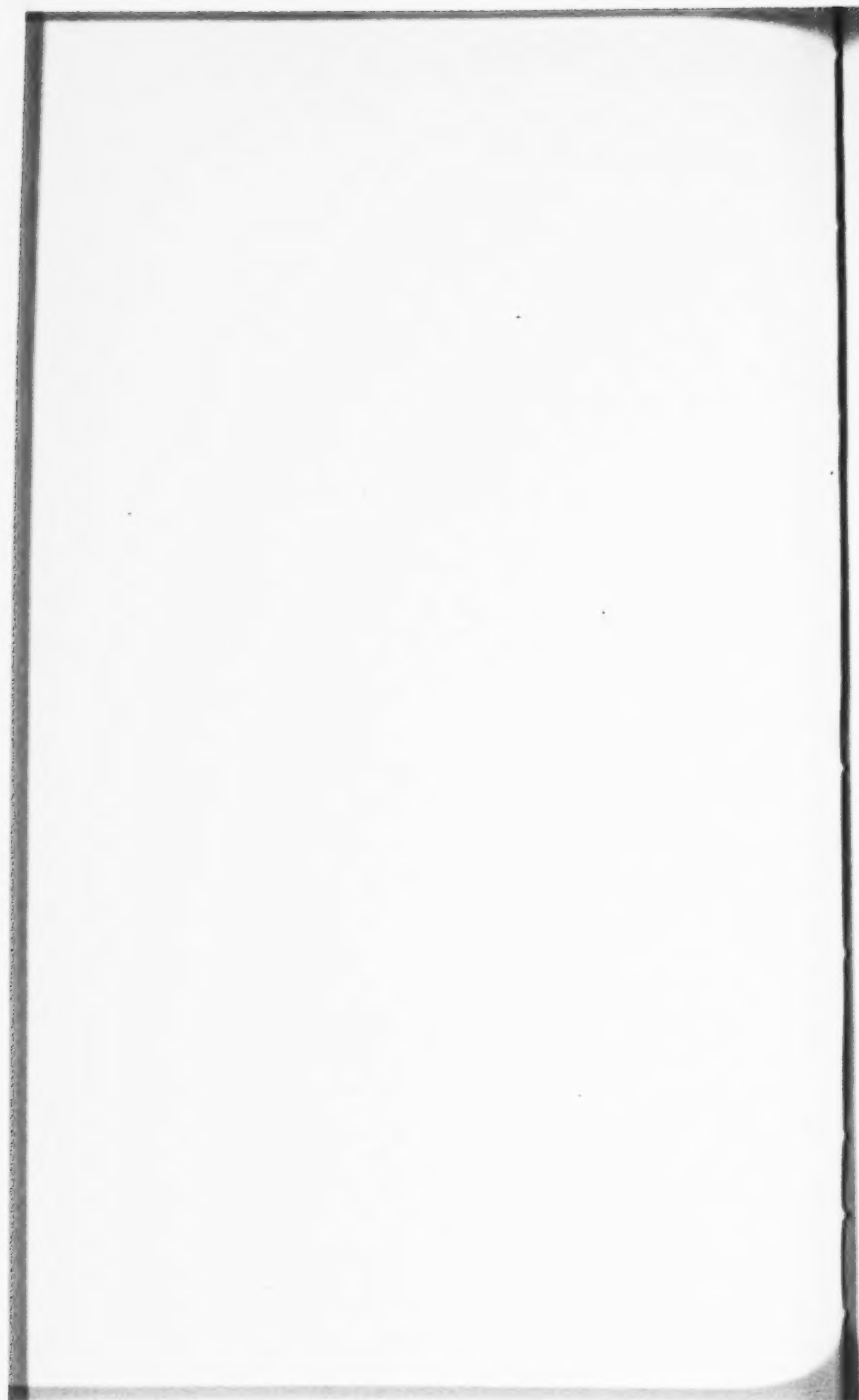
AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND A CITIZEN OF THE STATE OF NEW YORK,

Respondent,

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

And now, this sixth day of April, 1914, come the petitioners, by their counsel, and move the court to advance the above-entitled cause for hearing for the reasons hereinafter set forth.

CHARLES H. BURR,
Solicitor for Petitioners.



IN THE SUPREME COURT OF THE UNITED STATES.

John A. S. Brown, a Citizen of the State of Pennsylvania, and Frank E. Schermerhorn, Trustee for Clara Schermerhorn, Under the Last Will and Testament of Thomas Cunningham, Deceased, a Citizen of the State of Pennsylvania,

Petitioners,

v.

Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, Under the Last Will and Testament of Conrad Braker, Jr., Deceased, and a Citizen of the State of New York,

Respondent.

CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SECOND CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioners, John A. S. Brown and Frank E. Schermerhorn, trustee for Clara Schermerhorn, under the last will and testament of Thomas Cunningham, deceased, hereby respectfully show:

First.—That on the third day of November, 1913, this Honorable Court granted and issued its writ of certiorari directed to the Circuit Court of Appeals for the Second Circuit in the above-entitled cause.

Second.—The bill in equity filed in the District Court was filed in order to obtain a decree that the assignees of an interest in a trust fund were entitled to receive the same from the trustee of such fund. The

parties complainant, citizens of Pennsylvania, were the assignees; the defendant, a citizen of New York, was the trustee. The suit was based on diversity of citizenship. The main point held by the Circuit Court of Appeals was that the assignor, although he had parted with his entire interest in the trust fund, was a necessary party, and that, as he was a citizen of the same State with the trustee, the Circuit Court of Appeals was without jurisdiction under section 24 (1) of the Judicial Code. The Circuit Court of Appeals therefore dismissed the bill.

Third.—The important points urged upon this court in the petition for a writ of certiorari were as follows:

A. The decision of the Circuit Court of Appeals that the District Court had no jurisdiction because the assignor of a trust fund could not have sued the trustee in a Federal Court on account of diversity of citizenship is directly opposed to the decision in *Ingersoll v. Coram*, 211 U. S. 335, and the case at bar cannot be distinguished therefrom.

B. The decision of the Circuit Court of Appeals that a claim by an assignee of the *cestui que trust* of a trust fund against the trustee is in the Federal Courts an action not of equitable jurisdiction, contravenes the long line of cases beginning with *Fowle v. Lawrason*, 5 Peters, 495 (vide p. 503), wherein it is held that, following the practice of the High Court of Chancery in England in 1789, jurisdiction exists "in all cases where a trustee is a party," to use the language of Mr. Chief Justice Marshall.

Fourth.—That, since the granting of the writ of certiorari in the above-entitled cause, the District Court of the United States, for the Southern District of New York, has dismissed for lack of jurisdiction on

the authority of the decision of the Circuit Court of Appeals for the Second Circuit in the above-entitled cause, three bills in equity; and the same are pending in this court upon appeal. That your petitioners are advised that motions will be made to advance the same under Rule Thirty-second of your Honorable Court. That the question of jurisdiction of the District Courts of the United States in respect to interests of decedents is of immediate importance, and the decision of the Circuit Court of Appeals for the Second Circuit in the above-entitled cause has resulted in the unsettlement of the law on this subject. That delay in determining these questions will necessarily result in the dismissal of many suits and an increase in the number of appeals to this court; which will be obviated by the advancement of the hearing of this cause and the disposition thereof.

Wherefore your petitioners humbly pray that this court will advance for argument to such early date as may be convenient to the court the above-entitled cause.

And your petitioners will ever pray.

CHARLES H. BURR,
*Solicitor for John A. S. Brown,
and Frank E. Schermerhorn,
Trustee, etc., Petitioners.*

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IN THE
Supreme Court of the United States.

October Term, 1914. No. 286.

IN EQUITY.

JOHN A. S. BROWN, A CITIZEN OF THE STATE OF PENNSYLVANIA, AND FRANK E. SCHERMERHORN, TRUSTEE FOR CLARA SCHERMERHORN, UNDER THE LAST WILL AND TESTAMENT OF THOMAS CUNNINGHAM, DECEASED, AND A CITIZEN OF THE STATE OF PENNSYLVANIA,

Petitioners-Complainants,
vs.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND A CITIZEN OF THE STATE OF NEW YORK.

Respondent-Defendant.

BRIEF ON BEHALF OF THE PETITIONERS-
COMPLAINANTS.

STATEMENT OF THE CASE.

This case comes before this Court on certiorari granted to the United States Circuit Court of Appeals for the Second Circuit. The District Court dismissed the Bill in Equity of Petitioners on the merits after hearing upon Bill, Answer, Replication and Proofs. Petitioners appealed. The Circuit Court of Appeals

reversed, ordering the Bill to be dismissed for want of jurisdiction by the District Court without prejudice as to the merits. This Court upon petition granted a certiorari. The jurisdictional questions have since been determined by the decision of this Court in a case between the same parties, growing out of the same action: *Brown v. Fletcher*, decided January 5th, 1915, reported 235 U. S. 589, in advance reports for January 20th, 1915, under a somewhat incorrect caption.

There remains for determination by this Court one single paramount question: Was the default decree entered by the Surrogates' Court for the County of New York *res judicata* of an issue heard in the District Court below upon bill, answer, replication and proofs? The facts appearing on the record necessary for the determination of this question, succinctly stated, are as follows:

Conrad Braker, Jr., died some twenty years ago. By the Fourteenth clause of his Last Will he bequeathed to his son, Conrad Morris Braker, a legacy of Fifty Thousand Dollars (\$50,000), to be paid to him in three instalments—\$20,000 ten years from the date of his death, \$20,000 fifteen years from the date of his death, and the remaining \$10,000 twenty years from the date of his death, to wit, on July 21st, 1910. (Record, pp. 21-22.) All the above payments were declared to be contingent upon Conrad Morris Braker surviving the respective periods. The accounts of the executors were duly settled, and the said legacy of \$50,000 was paid to the defendant herein, Austin B. Fletcher, as Testamentary Trustee under the said Will, to hold the same in accordance with the provisions of the Fourteenth paragraph thereof. The two payments of \$20,000 were duly made.

On June 7th, 1911, petitioners, Brown and Schermerhorn, filed this Bill in the Circuit Court.

(Record, p. 57.) The Bill (Record, pp. 1-57) recited that Conrad Morris Braker had sold to one Frank L. Rabe absolutely, all his right, title and interest in and to the aforesaid legacy of \$10,000, and that complainants, Brown and Schermerhorn, as assignees of Frank L. Rabe, were entitled to receive from the defendant as Testamentary Trustee the aforesaid legacy of \$10,000.

Defendant demurred to the Bill. (Record, pp. 71-73.) The demurrer was overruled in an opinion by Judge Hand, with an order of *respondeat ouster*. (Record, pp. 75-77.) The defendant then answered, setting up again the various points of law already decided upon demurrer, but not setting up any claim of *res judicata*. (Record, pp. 101-127.) The case might then have been put down on bill and answer, except that the answer required proof of the documentary title of Brown and Schermerhorn. A replication was filed (Record, pp. 128-129) and the evidence taken before an Examiner. (Record, p. 135 *et seq.*) The case was then heard upon bill, answer, replication and proofs.

Upon the hearing, a motion was made to amend the answer by interposing the defense of *res judicata*, which motion was, under objection, granted. (Record, pp. 317-320.) The record already contained the documentary evidence upon this claim which had been offered under objection before the Examiner, and the case was thereupon argued. Judge Holt disregarded the remaining defences as already disposed of by the decision on the demurrer, but sustained the defence of *res judicata*, and decreed the dismissal of the Bill. (Opinion, Record, pp. 321-325.) (Order, Record, pp. 338-339.)

The documentary facts pertaining to the defence of *res judicata*, are as follows:

After the decision upon the demurrer, and before filing the answer, the defendant herein filed what purported to be an account in the Surrogates' Court of the County of New York. (Record, pp. 214-221.) He obtained a citation thereon (Record, pp. 224-225) upon the averment that Brown and Schermerhorn and Conrad Morris Braker had some claim in and to this \$10,000 legacy. Brown and Schermerhorn were citizens of Pennsylvania, and resided in the City of Philadelphia. An order of extra-territorial service was obtained (Record, pp. 228-229), but was defectively served [the defective quality of the service is discussed on page 34 *et seq* of this brief]. On the return day of the citation, Brown and Schermerhorn appeared specially in the Surrogates' Court (Record, p. 260) and filed a petition for removal to the District Court on the ground of the existence of a separable controversy. (Record, pp. 250-257.) After the case was removed, acting in conformity with the Judicial Code, Brown and Schermerhorn filed their answer in the said District Court. (Record, pp. 290-294.) Fletcher moved to remand. Judge Lacombe granted the motion to remand (Opinion, Record, p. 296, Order of remand, Record, p. 297). Then ensued the obtaining of a default decree dated August 2, 1912, in the Surrogates' Court in favor of Fletcher by the following method:

A certified copy of the Order for remand was filed by counsel for Fletcher in the Surrogates' Court. Counsel for Fletcher did not file the Answer made in the District Court, nor make any reference thereto, but filed an affidavit (called an affidavit of regularity), (Record, pp. 332-333), reciting an alleged service upon Brown and Schermerhorn in the manner therein set forth, and further averring that "none of the parties "cited has appeared herein, except Conrad Morris "Braker, who has appeared by his attorney, Safford

"A. Crummey." (Record, p. 333.) No reference to, or statement concerning, the removal to the District Court or the proceedings had therein appears in this affidavit. Thereupon, without notice to Brown and Schermerhorn, or to their counsel, acting upon this affidavit of regularity, the Surrogate entered a decree purporting to make judicial settlement of the account, and directing the payment of the \$10,000 legacy to Conrad Morris Braker. (Record, pp. 239-242.) Counsel for Fletcher, and counsel for Conrad Morris Braker occupied the same offices with the defendant Fletcher (Record, p. 312), and counsel for Conrad Morris Braker admitted in writing notice of, and consented to, and joined in procuring, the decree of August 2nd, 1912. (Record, p. 242.) So soon as counsel for Brown and Schermerhorn learned of this default decree, dated August 2nd, 1912, an application (Record, pp. 302-304) was made before Judge Lacombe, asking for a rehearing of the order of remand, and a rule to show cause was granted. (Record, pp. 300-301.) An application was also made to the Surrogate for an order vacating the said decree of August 2nd, 1912, settling the account. (Record, pp. 310-314.) A rule to show cause was granted (Record, pp. 309-310) by the Surrogate containing the following order: "It is further ordered that pending the argument upon the motion noticed by this order to show cause, and the entry of an order thereupon, that the said Austin B. Fletcher, as Testamentary Trustee, and his attorney, be *stayed* from proceeding under or pursuant to said decree of August 2, 1912." (Record, p. 310.)

Such was the state of the record in the Federal District Court on final hearing, and on these record facts Judge Holt dismissed the bill on the ground that the decree of the Surrogates' Court of August 2nd,

1912, although suspended and modified by the order of August 10th, 1912, constituted *res judicata* of the issues in this cause. The opinion will be found in the Record, pages 321-325, and the decree of dismissal in the Record, pages 338-339.

From this decree Brown and Schermerhorn appealed to the Circuit Court of Appeals, assigning as error the dismissal of the Bill which had been made upon the ground that the plea of *res judicata* had been sustained. The Circuit Court of Appeals reversed, directing the dismissal of the suit on the ground of lack of jurisdiction (Record, p. 367). An opinion was filed (Record, pp. 362-366) placing the dismissal upon the ground: (a) That the citizenship of the original legatee was the same as the citizenship of the Trustee and therefore under § 24 of the Judicial Code the action could not be maintained; (b) Because the action should have been at law and not in equity; (c) Because Conrad Morris Braker was not made a party to the suit.

This Court thereupon granted its writ of certiorari.

SPECIFICATION OF ERRORS IN THE SUPREME COURT.

First: The learned Circuit Court of Appeals erred in directing the dismissal of the Bill of Complaint on the ground of lack of jurisdiction by the District Court for the Southern District of New York.

Second: The learned Circuit Court of Appeals erred in failing to direct a decree in favor of Petitioners-Complainants in accordance with the prayer of the Bill.

Third: The learned Circuit Court of Appeals erred in declining to sustain the specifications of errors relied on by Petitioners-Complainants.

SPECIFICATION OF ERRORS IN THE CIRCUIT COURT OF APPEALS.

First: The learned District Court of the United States, for the Southern District of New York erred in dismissing the Bill of Complaint in the above-entitled cause, after hearing on bill, answer, replication and proofs and rehearing.

Second: The said Court erred in failing to enter a decree for complainants in the above-entitled cause after hearing on bill, answer, replication and proofs and rehearing.

Third: The said Court erred in sustaining the sufficiency of the plea of *res judicata* raised by the amended answer of defendant to the Bill of Complaint in the above-entitled cause.

Fourth: The said Court erred in sustaining the sufficiency of the plea of *res judicata* raised by the amended answer of the defendant to the Bill of Complaint in the above-entitled cause for the reason that the said Court which entered the decree so sought to be raised had no jurisdiction of these complainants, who were attempted to be made parties defendant therein.

Fifth: The said Court erred in sustaining the sufficiency of the plea of *res judicata* raised by the amended answer of the defendant to the Bill of Complaint in the above-entitled cause for the reason that the Court which entered the decree so sought to be used had no jurisdiction of the cause of action as respects these complainants, said jurisdiction having lodged in the United States District Court from which this appeal was taken, by virtue of the institution of the above-entitled action prior to the institution of the suit the decree of which was sought to be used as *res judicata*.

Sixth: The said Court erred in sustaining the sufficiency of the plea of *res judicata* raised by the amended answer of the defendant to the Bill of Complaint in the above-entitled cause for the reason that the decree sought to be used as *res judicata* was not a final decree, but one the operation of which had been stayed by the Court which rendered it.

(Record, pp. 344-346.)

ARGUMENT.

The Answer as originally filed set forth six distinct matters of defence, including the question of jurisdiction; and the amendment to the Answer set up a further and seventh defence of *res judicata*. The question of jurisdiction is substantially disposed of by the decision of this Court in *Brown v. Fletcher*, 235 U. S. 589, decided this term and printed in the advance reports for January 20th, 1915; but requires some additional reference to one point not involved in that case. This question of jurisdiction will, therefore, be first considered. The other defences set forth in the original Answer will be noticed briefly hereafter, *infra*, page 45 *et seq.*, but the main question of *res judicata* will first be fully argued. Upon this head it will be shown, first, that the Surrogates' Court had no jurisdiction to enter its decree, when the subject-matter had already been drawn within the control of the Federal District Court in a prior suit, to wit, the suit at bar; second, that on the face of the record, the decree of the Surrogates' Court was obtained by fraud in law, if not in fact; third, that the Surrogates' Court had no jurisdiction over Brown and Schermerhorn, because of defective extra-territorial service appearing on the face of the record; and fourth, that the decree could not constitute *res judicata* because it was not a final decree.

A. THE DISTRICT COURT HAD JURISDICTION OF THIS CASE.

The Circuit Court of Appeals in its opinion (Record, pp. 362-366) held: I. That under § 24 of the Judicial Code no jurisdiction existed where the original legatee was a citizen of the same State as the Trustee. II. That an adequate and complete remedy

lay at law. III. That Conrad Morris Braker, the assignor, was a necessary party and the bill should therefore be dismissed.

I. THE FIRST POINT IS DISPOSED OF BY THE DECISION OF THIS COURT IN *BROWN V. FLETCHER*, REPORTED IN 235 U. S. 589 (decided January 5th, 1915, reported in *Advance Reports* for January 20th, 1915, under the incorrect caption of "*Brown, Trustee for Schermerhorn, Under Will of Cunningham v. Fletcher*," the correct title being the same as the case at bar, with the addition of Conrad Morris Braker as a party defendant).

II. THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT A CLAIM BY AN ASSIGNEE OF THE CESTUI QUE TRUST OF A TRUST FUND AGAINST THE TRUSTEE IS, IN THE FEDERAL COURTS, AN ACTION NOT OF EQUITABLE JURISDICTION, CONTRAVENES THE LONG LINE OF CASES BEGINNING WITH *FOWLE V. LAWASON*, 5 PETERS, 495 (*vide* page 503) WHEREIN IT IS HELD THAT, FOLLOWING THE PRACTICE OF THE HIGH COURT OF CHANCERY IN ENGLAND IN 1789, JURISDICTION EXISTS "IN ALL CASES WHERE A TRUSTEE IS A PARTY," TO USE THE LANGUAGE OF MR. CHIEF JUSTICE MARSHALL.

No proposition of equitable procedure is more elementary than that which declares that equity has jurisdiction of all causes where the enforcement of a trust is involved. While this jurisdiction is rested upon the inability of the ancient common law to furnish full, adequate and complete relief, it is unnecessary to inquire how far the existence of a legal remedy affects the right to equitable relief, because the control of equity over all trust questions is fundamental and, in the Federal Courts, based upon that of the High Court of Chancery in England at the time of the adoption of the Judiciary Act of 1789, and is not to be restrained

other than by the Constitution and laws of the United States.

The principle is enunciated by this court in *Fowle v. Lawrason*, 5 Peters, 495 (1831), where Mr. Chief Justice Marshall said:

“In all cases in which an action of account
“would be the proper remedy at law, and in all
“cases where a trustee is a party, the jurisdiction
“of a court of equity is undoubted. It is the ap-
“propriate tribunal” (at p. 503).

Again in *Oelrichs v. Spain*, 15 Wall. 211-228 (1872). This was a bill to enforce liability under certain injunction bonds. The parties complainant were the executors of one of the obligors on these bonds and the executor and devisee of one who made no claim for his own benefit but solely in trust for the benefit of the other complainant. It was insisted by the appellants that a suit on a bond against principals and sureties is, in its nature, a suit at the common law. Mr. Justice Swayne, in reply to this contention, said:

“There is an element of trust in the case
“which, wherever it exists, always confers juris-
“diction in equity.”

In *Clews v. Jamieson*, 182 U. S. 461 (1901), the whole question is so clearly and concisely stated that your petitioners are content to rest their contention upon it. The controversy therein related to certain funds deposited by the complainants with the governing committee of the Chicago Stock Exchange to secure the performance of a certain contract between the complainants and others. Upon default by the latter, the complainants sought, by bill in equity, to compel the committee to repay these funds which the committee, while laying no claim thereto, refused to do on the ground of a dispute as to the ownership. Mr. Justice Peckham, after declaring that the committee “became

a trustee of the fund charged with the duty of seeing that it was applied in conformity with the provisions creating it," said:

"Pomeroy in his work on Equity Jurisprudence, second edition, instances, among other equitable estates and interests which come within the jurisdiction of a court of equity, those of trusts. In volume one, at section 151, he says: 'The whole system fell within the exclusive jurisdiction of chancery; the doctrine of trusts became and continues to be the most efficient instrument in the hands of a chancellor for maintaining justice, good faith, and good conscience; and it has been extended so as to embrace not only lands, but chattels, funds of every kind, things in action, and moneys.'

"All possible trusts, whether express or implied, are within the jurisdiction of the chancellor. In this case, the committee, as trustee, was charged with the performance of some active and substantial duty in respect to the management and payment of the funds in its hands, and it was its duty to see that the objects of its creation were properly accomplished. The fact that the relief demanded is a recovery of money only is not important in deciding the question as to the jurisdiction of equity. The remedies which such a court may give depend upon the nature and object of the trust; sometimes they are specific in their character, and of a kind which the law courts cannot administer, but often they are of the same general kind as those obtained in legal actions, being mere recoveries of money. A court of equity will always, by its decree, declare the rights, interest or estate of the *cestui que trust*, and will compel the trustee to do all the specific acts required of him by the terms of the trust. It often happens that the final relief, to be obtained by the *cestui que trust* consists in the recovery of money. This remedy the courts of equity will always decree when necessary, whether it is confined to the payment

“of a single specific sum, or involves an accounting by the trustee for all that he has done in pursuance of the trust, and a distribution of the trust moneys among all the beneficiaries who are ‘entitled to share therein.’ 1 Pom. Eq. Jur., sec. 158.

“In cases where the equity doctrine of trusts ‘has been extended so as to embrace other relations of a fiduciary kind, while it may not be said that a court of equity possesses exclusive jurisdiction, yet it is well settled that in such case there is so much of the trust character between the parties so situated that the jurisdiction of equity, though not exclusive, is acknowledged.’ 1 Pom. Eq. Jur., sec. 157.

“In *Foley v. Hill*, 2 H. L. Cas. 28, a question ‘arose over that sort of relation which exists between a banker and his depositor, and it was held to be merely that of debtor and creditor. The court added, however, that, as between principal and factor, an equitable jurisdiction attached because the latter partook of the character of a trustee, and that ‘so it is with regard to an agent dealing with any property. . . . And though he is not a trustee according to the strict technical meaning of the word, he is *quasi* a trustee for that particular transaction,’ and, therefore, equity has jurisdiction.

“In *Marvin v. Brooks*, 94 N. Y. 71, it was ‘held that an agent who had been entrusted with his principal’s money to be expended for a specific purpose might be required to account in equity, and that upon such an accounting the burden was upon him to show that his trust duties had been performed and the manner of their performance. The jurisdiction was placed upon the ground of a fiduciary or trust relation and it was held that a court of equity had jurisdiction over trusts and those fiduciary relations which partake of that character, and in such cases ‘the right to an accounting is well established; but it was held that the existence of a bare agency ‘was not sufficient. It must be an agency coupled

“with some distinct duty on the part of the agent
“in relation to funds or some specific property.

“In 2 Story’s Eq. Jur. (12th Ed.) it is stated,
“at section 975a, that in general a trustee is suable
“in equity in regard to any matters touching the
“trust.

“In *Oelrichs v. Spain*, 15 Wall. 211, 228, the
“court remarked that there being an element of
“trust in the case, that element, wherever it
“existed, always confers jurisdiction in equity.

“That the governing committee could file a
“bill of interpleader against the complainants and
“the other defendants, alleging that each claimed
“the fund, or some portion thereof, and ask the
“court to determine which of the parties was en-
“titled to the same, furnishes no reason for ex-
“cluding the jurisdiction of equity in this case.”
(Page 479 *et seq.*)

The circumstances of the case just cited place it
on all fours with the case at bar, and the ruling therein
made it incumbent upon the Circuit Court of Appeals
to sustain the equitable jurisdiction. In addition it is
submitted that the bill was filed in accordance with
the equitable principles laid down by, and the equitable
practice followed in, the cases of:

Payne v. Hook, 7 Wall. 425 (1868);

Byers v. McAuley, 149 U. S. 608 (1893);

Ingersoll v. Coram, 211 U. S. 335 (1908);

*Waterman v. Canal-Louisiana Bank, &c.,
Co.*, 215 U. S. 33 (1909).

In the last mentioned case, Mr. Justice Day said:

“From an early period in the history of this
“court cases have arisen requiring a considera-
“tion and determination of the jurisdiction of the
“courts of the United States to entertain suits
“against administrators and executors for the
“purpose of establishing claims against estates,
“and to have a determination of the rights of per-
“sons claiming an interest therein. And this

"court has had occasion to consider how far the
 "jurisdiction in equity of the courts of the United
 "States in such matters may be affected by the
 "statutes of the states providing for courts of
 "probate for the establishment of wills and the
 "settlement of estates. We will not stop to
 "analyze or review in detail all these cases, as
 "they have been the subject of frequent and re-
 "cent consideration in this court. The general
 "rule to be deduced from them is that, inasmuch
 "as the jurisdiction of the courts of the United
 "States is derived from the Federal Constitution
 "and statutes, that in so far as controversies be-
 "tween citizens of different states arise which are
 "within the established equity jurisdiction of the
 "Federal Courts, which is like unto the High
 "Court of Chancery in England at the time of the
 "adoption of the Judiciary Act of 1789, the juris-
 "diction may be exercised, and is not subject to
 "limitations or restraint by State legislation es-
 "tablishing courts of probate and giving them jur-
 "isdiction over similar matters. This court has
 "uniformly maintained the right of Federal
 "Courts of Chancery to exercise original jurisdic-
 "tion (the proper diversity of citizenship exist-
 "ing) in favor of creditors, legatees and heirs to
 "establish their claims and have a proper execu-
 "tion of the trust as to them" (at p. 43).

The decision of the Circuit Court of Appeals, it is respectfully suggested, contravenes the long line of cases beginning with *Fowle v. Lawrason*, *supra*, wherein it is held that jurisdiction exists "in all cases where a trustee is a party," and, if left unreviewed, will unsettle the universal practice in Federal District Courts in entertaining bills to determine and declare the rights of non-resident citizens in and to estates and trust funds established in a long line of cases summarized by this Court in the recent case of *Waterman v. Canal-Louisiana Bank, &c., Co.*, from which the quotation last above made is taken.

III. (a) THE DECISION OF THE CIRCUIT COURT OF APPEALS THAT CONRAD MORRIS BRAKER, ABSOLUTE ASSIGNOR OF HIS ENTIRE INTEREST IN THE ESTATE OF HIS FATHER, IS A NECESSARY PARTY TO AN ACTION BY HIS ASSIGNEE TO RECOVER SUCH INTEREST, IS CONTRARY TO THE UNIVERSAL RULING OF THIS COURT AND FEDERAL COURTS IN GENERAL.

Conrad Morris Braker, it was asserted by the Circuit Court of Appeals, is a necessary party to this action. An examination of the facts involved will show the creation of a trust by the will of one Conrad Braker, Jr., in favor of his son, Conrad Morris Braker, the appointment of the respondent as testamentary trustee thereunder and the payment to him of the funds involved. It will further show that on June 13th, 1901, by a certain instrument in writing, duly proved and offered in evidence and found on pages 26-30 of the Record, Conrad Morris Braker, "granted, bargained, sold, assigned, transferred and set over, unto one Frank L. Rabe [complainants' predecessor in title], his heirs, executors, administrators and assigns," *"any and all my [his] estate, right, title and interest, of, in and to"* the said fund, and made an irrevocable power of attorney to the said Rabe, with full power of substitution, to demand, receive, etc., the said fund.

It is clear from this summary that Braker parted absolutely with his right and title to the entire fund sought by the petitioners. No relief is sought against him. He has no standing to object to payment in accordance with the terms of his own act. This is not a proceeding to set aside a conveyance. Braker has not sought to intervene. Yet the learned Circuit Court of Appeals says that he is a *necessary* party to the bill.

The Federal Courts have been uniform in holding that one who, prior to the commencement of a suit, has parted absolutely and entirely with his title to the

property in controversy, while he may be a proper party, is not a necessary party thereto.

In *Harris v. Johnston*, 3 Cranch, 311 (1806), which was an action of assumpsit for goods sold and on a promissory note given in payment, which note when delivered bore the endorsement of a third party, and had been subsequently assigned by the complainant, Mr. Chief Justice Marshall said:

“Upon principle, it would appear that such “an action [for goods sold] could not be maintained. The endorsement of the note passes the “property in it to another, and is evidence that it “was sold for a valuable consideration.”

“If after such endorsement, the seller of the “goods could maintain an action on the original “contract, he would receive double satisfaction.” (At page 317.)

In *Land Company of New Mexico v. Elkins*, 20 Fed. 545 (1884), the bill alleged the making of an agreement to purchase land, the purchase thereof and title taken in the name of defendant, that one Smoot, one of the original parties to the agreement, had paid his share therefor and then assigned to complainant under what the Court held to be an executory agreement. The prayer was for a conveyance of Smoot's share and for an injunction. Smoot having been dismissed as a party on the ground that he was a resident of the District of Columbia, the other defendant moved to dismiss on the ground that Smoot was an indispensable party. The Court said:

“If the complainant had acquired Smoot's interest in the lands by a transfer, absolute and “fully executed, the latter would not be a necessary party to the controversy. *Blake v. Jones*, “3 Anst. 651. An assignor who has made an absolute assignment of his interest need not be a “party to a suit by the assignee to enforce the

“equitable title acquired by the transfer against
 “the third party, even when the former retains
 “the legal title.” (At page 546.)

So in *Brissell v. Knapp*, 155 Federal, 809 (1907), which was a bill to enforce a constructive trust in stock of a corporation made by the assignee of one who had deposited the stock under a pooling agreement, the Court said, on demurrer:

“Longabaugh (the assignor) has no interest
 “in the stock, either legal or equitable, as against
 “complainant. It does not appear that he claims
 “any, and if he were to make such a claim against
 “complainant he would be estopped.”

“No relief is sought against Longabaugh.
 “. . . He is not a necessary party to the cause
 “of action set out in the pleadings.” (At page 814.)

Again, in *Fidelity & Deposit Company of Maryland v. Fidelity Trust Company*, 143 Fed. 152 (1906), where the receivers of an insolvent insurance society assigned to complainant all of their rights in certain funds held by depositories of the society, the Court said:

“The assignments made by the receivers
 “. . . are absolute on their face and conveyed
 “to the complainant whatever rights the Order of
 “Chosen Friends or its receivers had in and to
 “their claims against the defendants. The settle-
 “ment agreement, it is true, provided that one-
 “quarter of whatever amount should be recovered
 “by the complainant . . . should go to the re-
 “ceivers in Maryland, but that is merely an execu-
 “tory agreement creating a right in the receiver
 “of the order in Maryland. . . . The assign-
 “ments made in pursuance of the agreement of
 “settlement are absolute on their face. The Mary-
 “land receiver of the order and the order itself
 “are, therefore, not essential or necessary par-
 “ties. They may be proper parties, but that is
 “the utmost that can be claimed.” (At page 156.)

Two cases decided by this Court are conclusive. The first of these is *Batesville Institute v. Kaufman*, 18 Wall. 151 (1873). This was a bill to enforce payment of a mechanics' lien. Certain builders having such a lien foreclosed and got judgment. They then assigned to a trustee in trust to pay certain debtors to whom they were indebted on promissory notes. The creditors assigned these notes and by endorsement thereon transferred all their right and interest in the deed of trust to Kaufman, the complainant, who filed his bill against the original owners of the building and their successors in title. In answer to the objection that the original assignors were necessary parties, Mr. Justice Hunt said:

"Hirsch & Adler [the original assignors] had parted with their interest in the notes and in the judgment, and by their assignment had vested the entire title thereto in their assignees. The sole right of recovery is in the latter parties; and if equities exist between them and their assignors, they are to be settled between them at their convenience and in their own manner. These defendants have no interest in that part of the transaction." (At page 154.)

The other case is that of *Robertson v. Carson*, 19 Wall. 94 (1873). It is submitted that the facts are so similar to those of the case at bar as to leave no room for doubt. A testator left his residuary estate to his executors in trust for his widow and children. These executors sold certain real estate and accepted in payment bonds secured by a mortgage. Subsequently, the purchasers sold the property to a firm, two members of which took title thereto for the others. Payment was made in Confederate money. Two of the legatees (William and James Carson), assigned their rights under the will to their mother, the widow of the testator, the other beneficiary under the trust, who then filed a

bill against the executors for an accounting and against the purchasers, etc., on the ground of failure of consideration. Mr. Justice Swayne said:

“The parties defendant made by the bill are “the executors, Robertson and Blacklock, and McBurney [present holder of the property], Elias “N. and W. J. Ball [the first mortgagor and his “surety] and William and James Carson [joint “legatees with the widow, to whom they had as- “signed]. Process was returned not found as to “William and James Carson and Elias N. Ball. “The two former having assigned all their rights “and interest to everything in controversy, it was “not necessary to make them parties. Nothing “more need be said in regard to them.” (At page 104.)

It is believed that these decisions show that Conrad Morris Braker, *cestui que trust* under the will of his father, Conrad Braker, Jr., who transferred his entire right, title and interest in the trust estate to Frank L. Rabe, petitioners' predecessor in title, with a full and irrevocable power of attorney, who has made no effort to be joined as a party herein and against whom no relief is prayed, is not a necessary party hereto.

(b) EVEN ASSUMING THAT CONRAD MORRIS BRAKER, THE ORIGINAL ASSIGNOR, IS A NECESSARY PARTY, IT IS URGED THAT THE BILL SHOULD NOT HAVE BEEN DISMISSED, BUT THAT AN ORDER SHOULD HAVE BEEN MADE THAT BRAKER BE BROUGHT IN BY SERVICE OF PROCESS.

In this connection the attention of the Court is directed to the fact that the objection as to parties was raised by respondent's demurrer, that this demurrer was overruled, that the judge who heard the case on the merits considered himself bound by the decision on demurrer and that not until the case reached the Circuit Court of Appeals was the defend-

ant's contention sustained. The case does not come within the 43rd Equity Rule providing that, if the plaintiff shall not set down the objection for argument, but shall proceed to a hearing, the Court may then dismiss or allow an amendment upon such terms as justice may require. Objection was made by demurrer, the demurrer was argued and decided *against* the objection. There was no reason for complainants to amend in the lower court. Yet when the Circuit Court of Appeals decided the appeal and reversed the decision of the District Court, no opportunity was given to petitioners to correct the alleged defect.

But even if the Circuit Court of Appeals did have power to dismiss, without prejudice, under the 43rd Equity Rule or by virtue of its general equity jurisdiction, it is submitted that under the practice followed by this Court in the cases of *Hunt v. Wickliffe*, 2 Peters, 201 (1829); *House v. Mullen*, 22 Wall. 42 (1874), and *Goodman v. Niblack*, 102 U. S. 556 (1880), such power should not have been exercised, but the case should have been remanded with directions to allow complainants to amend their bill as they may be advised and, if they fail to do this within a reasonable time, to dismiss it without prejudice.

Hunt v. Wickliffe, 2 Pet. 201 (1829), was a bill in equity to obtain a conveyance of lands of which the defendants had the legal title, but to which the plaintiffs claimed the equitable title. At the hearing the bill was dismissed with costs for want of parties. Said Mr. Chief Justice Marshall:

“As the plaintiffs claimed under a conveyance made in pursuance of a decree of a court of competent jurisdiction, we do not think their bill ought to have been dismissed. The Circuit Court ought to have given leave to make new parties; and on their failing to bring the proper parties before the Court, the dismissal should be without prejudice.”

“The decree of the Circuit is reversed, and
 “the cause remanded; with directions that the
 “plaintiffs have leave to amend their bill, and
 “make new parties.” (At page 214.)

In *House v. Mullen*, 22 Wall. 42 (1874), a bill in equity was dismissed on demurrer for want of or misjoinder of parties, the decree being in such form as to render it a bar to future suit by the complainant. On appeal the Supreme Court reversed and remanded, Mr. Justice Miller saying:

“If the decree had dismissed the bill without prejudice or had stated as the ground of dismissal the misjoinder of parties or want of interest in two of them, we would have affirmed it, but to prevent what may be a great injustice, we must reverse the present decree and remand the case, with directions to allow plaintiffs to amend their bill as they may be advised and if they fail to do this within a reasonable time, to dismiss it without prejudice.” (At page 47.)

The case of *Goodman v. Niblack*, 102 U. S. 556 (1880), was a bill in equity by a judgment creditor to enforce the lien of his judgment, brought against the administrator of his judgment debtor. After the judgment had been entered the decedent had assigned his property for the benefit of creditors, and the fund sought to be impressed with the lien was still in the hands of the assignees in insolvency, who were not made parties. The Court below dismissed the bill on demurrer, on the ground that the assignees were necessary parties. On appeal this Court reversed and remanded. Mr. Justice Miller said:

“If the decree of the Circuit Court had dismissed the case without prejudice for want of proper parties, we should have been bound to affirm it. But standing as it does now, it is a decision on the merits of the case and a bar to any

“other suit. It must, therefore, be reversed and remanded to that court. *If the complainant shall ask leave to amend his bill by making Cheever and Wiles [the assignees in insolvency] defendants, he should be permitted to do so, and proceed with his case. If he does not do this, a decree should be entered dismissing the bill for want of these parties and without prejudice to any other suit on the merits.*” (At page 563.)

The language of Judge Story in *Hoxie v. Carr*, 12 Fed. Cas., No. 6802, page 746, 1 Sumn. 173 (1832), on this point is illuminating. Judge Story says:

“The nature of an abatement in equity [raised by an objection of want of parties] seems to have been misunderstood at the argument. It is not necessarily a destruction of the suit, like an abatement at law, where a judgment, *quod casetur*, is entered. *It is merely an interruption to the suit, suspending its progress, until the new parties are brought before the court; and if this is not done at the proper time, the court will dismiss the suit.*” (At page 747.)

It is submitted that by reason of the circumstances under which the question of parties was raised and decided, first in favor of the petitioners and finally against them, they should have been allowed to bring in Conrad Morris Braker as a party (if indeed he was a necessary party), and not be compelled to institute a new action subject to the hardships and difficulties which have arisen since the institution of this suit by which they would not be affected if the present action is sustained.

B. The Defence of Res Judicata.

I. The Surrogates' Court had no jurisdiction to enter its decree, when the subject matter had already been drawn within the control of the Federal District Court in a prior suit, to wit, the suit at bar.

On June 7, 1911, this bill was filed. On March 15, 1912, after the overruling of the demurrer in the suit at bar, and before filing the answer, the petition for a citation was filed in the Surrogates' Court of the City of New York. There were, and are, absolutely no questions pertaining to the administration of the decedent's estate. The executors had long since accounted. Defendant was a substituted testamentary trustee, having in his undisputed possession a \$10,000 legacy which was to be paid over to Conrad Morris Braker, or his assigns, upon his surviving the date of July 21, 1910. This bill was filed to enforce a lien against this specific fund, and to compel the trustee to pay it over to the complainants Brown and Schermerhorn, who were the assignees of Conrad Morris Braker. It is submitted that this is a suit, which in its nature, gives to the Court which first acquires jurisdiction exclusive power to hear and determine the case.

There are two lines of decisions of significance. The first includes the cases of *Suydam v. Broadnax*, 14 Pet. 67 (1840); *Hyde et al. v. Stone*, 20 How. 170, 175 (1857); *Green's Adm'r's v. Creighton et al.*, 23 How. 90 (1859); *Payne v. Hook*, 7 Wall. 425 (1868); *Lawrence v. Nelson*, 143 U. S. 215 (1892); *Hayes v. Pratt*, 147 U. S. 557, 570 (1893); *Byers v. McAuley*, 149 U. S. 608 (1893); *Ingersoll v. Coram*, 211 U. S. 335 (1908). In *Waterman v. Canal-Louisiana Bank &c.*

Company, 215 U. S. 33 (1909), these cases are considered, approved, and the law on this subject summed up by the Supreme Court in the following language:

“From an early period in the history of this
 “Court cases have arisen requiring a considera-
 “tion and determination of the jurisdiction of the
 “courts of the United States to entertain suits
 “against administrators and executors for the pur-
 “pose of establishing claims against estates, and
 “to have a determination of the rights of persons
 “claiming an interest therein. And this Court has
 “had occasion to consider how far the jurisdiction
 “in equity of the courts of the United States in
 “such matters may be affected by the statutes of
 “the states providing for courts of probate for the
 “establishment of wills and the settlement of
 “estates. We will not stop to analyze or review in
 “detail all these cases, as they have been the sub-
 “ject of frequent and recent consideration in this
 “Court. The general rule to be deduced from them
 “is that, inasmuch as the jurisdiction of the courts
 “of the United States is derived from the Fed-
 “eral Constitution and statutes, that in so far as
 “controversies between citizens of different states
 “arise which are within the established equity
 “jurisdiction of the Federal Courts, which is like
 “unto the High Court of Chancery in England at
 “the time of the adoption of the Judiciary Act of
 “1789, the jurisdiction may be exercised, and is
 “not subject to limitations or restraint by state
 “legislation establishing courts of probate and
 “giving them jurisdiction over similar matters.
 “This Court has uniformly maintained the right
 “of Federal Courts of Chancery to exercise orig-
 “inal jurisdiction (the proper diversity of citizen-
 “ship existing) in favor of creditors, legatees and
 “heirs to establish their claims and have a proper
 “execution of the trust as to them.” (At page
 43.)

The Supreme Court then points out that this jurisdiction exists, although the *res* is already in actual pos-

session of the State Court, and that the Federal Court has power to enter its decree and establish the right of the non-resident claimant, which the State Court must thereafter recognize and enforce.

The study of these cases will show that the right to obtain an adjudication in the Federal Court upon the title and rights of the non-resident citizen is always recognized, even where by a proceeding *in rem* the State Court has theretofore acquired jurisdiction of the estate. In *Byers v. McAuley*, 149 U. S. 608 (1893), for example, the bill was filed in the Federal Court the day before the hearing in the State Court, and was sustained. To hold, as did the Court below, that the jurisdiction of the Federal Court in such cases may be evaded by the simple expedient of filing accounting proceedings and bringing in by extra-territorial process the non-resident complainants in the Federal suit, is to ignore the force and effect of this line of decisions.

But the second line of cases is directly in point. As already shown, in the case at bar, this is not a probate proceeding for the settling of a decedent's estate; that has been completed long ago; it is a simple proceeding to compel a substituted trustee to turn over a legacy in his hands. It is not questioned that this legacy is in his hands; it is not questioned that any act of administration with reference thereto, or any act of conversion, remains to be done. It is simply a question of the title to and lien upon this fund. In *Farmers' Loan and Trust Company v. Lake Street R. R. Co.*, 177 U. S. 51 (1900), we have the principle applicable to this case laid down in language of unusual clarity. Says the Supreme Court:

“The possession of the *res* vests the Court
 “which has first acquired jurisdiction with the
 “power to hear and determine all controversies
 “relating thereto, and for the time being disables

“other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.

“Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another Court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the Court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and State Courts. *Peck v. Jenness*, 7 How. 612; *Freeman v. Howe*, 24 How. 450; *Moran v. Sturges*, 154 U. S. 256; *Central Bank v. Stevens*, 169 U. S. 432; *Harkrader v. Wadley*, 172 U. S. 148.” (At page 61.)

The principle of this case has been followed and adopted and enforced in a series of cases thereafter arising. Among these are *Julian v. Trust Co.*, 193 U. S. 93 (1904); *Wabash R. R. Co. v. Adelbert College*, 208 U. S. 39 (1908).

They unite in holding that in a case, such as the one at bar, where, even if the property had not been seized yet the principle applies “as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts,” etc., to again use the language in the *Lake Street R. R. Co.* case. The remedy in all these cases does not cease with the entry of judgment by a State Court, as is specified in the case of *Julian v. Trust Company*, supra.

A fortiori, the judgment obtained in a State Court will not be allowed to be pleaded as *res judicata* of a litigation to which the jurisdiction of this Court has

already attached, when the nature of the case is one which seeks to establish a lien to specific property which might or might not thereafter pass into the control of the Federal Court. It is therefore submitted that the entire policy of the Federal Constitution in giving the right to non-resident claimants to have their cases heard in the Federal Courts, unites with the essentially fundamental principle regulating conflicts of jurisdiction, to lead one to the conclusion that where the jurisdiction of a Federal Court has once attached, its jurisdiction cannot be evaded in any such fashion as that attempted in the case at bar. Such would seem to be the inevitable effect of the two lines of decisions above considered.

In concluding his opinion in the Court below, Judge Holt said, with reference to the claim in the Surrogates' Court: "Even if it should be vacated, I "think that the Surrogates' Court having once entered "its decree, will continue thereafter in sole control of "the litigation." In this connection, attention is called to the very recent case of *McClellan v. Carland*, 217 U. S. 268 (1910), wherein the Supreme Court of the United States took the almost unprecedented course of granting a certiorari under Section 716, Revised Statutes, to review the refusal of the Circuit Court of Appeals for the Eighth Circuit to grant a mandamus directed to the Circuit Court to set aside a stay entered by the Circuit Court. The suit below was a suit similar to the case at bar, and the action was stayed pending the determination in a State Court of the issues involved. The Court said: "It therefore appeared upon the record "presented to the Circuit Court of Appeals that the "Circuit Court had practically abandoned its jurisdiction over a case of which it had cognizance, and turned "the matter over for adjudication to the State Court. "This, it has been steadily held, a Federal Court may

"not do" (at page 281). This case not only shows that the learned trial Judge erred in his conception of the relative powers and duties of the Federal Courts and the State Courts in the case at bar, but demonstrates that so astute is the Supreme Court of the United States to protect the rights of non-resident claimants to their day in a Federal Court, that the Supreme Court intervened by the extraordinary writ of certiorari under Section 716 of the Revised Statutes, in order to secure such rights to the non-resident.

II. On the face of the Record, the decree of the Surrogates' Court was obtained by fraud.

An examination of the Record discloses a situation which can well be termed extraordinary. Complainants' counsel followed the provisions of the Judicial Code. They entered there a special appearance and at the same time presented their petition to remove. When the case was in the Federal Court upon removal, they there filed in accordance with Section 29 of the Judicial Code a general appearance and an answer. Thereafter, the cause was remanded. Immediately, without notice to complainants, counsel for Fletcher obtained the order to remand and, taking it to the Surrogates' Court without carrying or filing in any form whatever in the Surrogates' Court the general appearance or the answer, an affidavit was made stating that Brown and Schermerhorn had been served in accordance with the order for extra-territorial service; that, to use the language of the affidavit, "none of the parties cited has appeared herein, except Conrad Morris Braker" (Record, pp. 333). No reference whatever was made to the answer filed in the District Court, no reference whatever even to the fact that the

case had been removed, or that it had been remanded. Relying upon this affidavit, and upon the truth of the statements therein contained, the Surrogate in mere formal fashion entered his decree settling the account and directing payment of the \$10,000 to Conrad Morris Braker. The decree did not even purport to pass upon the claims of Brown and Schermerhorn. It simply ignored them. It was a *pro forma* decree, obtained *ex parte* upon an affidavit which not only suppressed the material fact on which it relied to obtain the default decree, but even directly misstated that fact. It was urged in the Court below by counsel for Fletcher that the affidavit was literally true because of the alleged conclusion of law that the answer filed in the District Court was a nullity. Counsel for petitioners-complainants are wholly willing to accept this explanation of the making of an affidavit, which obviously requires an explanation. Let it be granted that the affidavit was made upon the theory that the answer filed in the District Court was no answer at all, the theory that the provisions of the Judicial Code have no force and effect when applied to proceedings in the Surrogates' Court of New York, the theory that the answer was a mere nullity as appellee claims; grant all this—can it yet be possibly argued with success in this Court that a statement purporting to be a statement of a fact upon which the default decree was entered in the Court below, may now and here be sustained by saying that it was in reality a conclusion of law? Can this be successfully argued when it is borne in mind that by this affidavit, raising on its face a series of averments of fact, petitioners-complainants were deprived of all opportunity to be heard on the alleged question of law, of all opportunity to urge that the conclusion of law was as grossly untrue as the averment of fact, that the Surrogates' Court of New York and the practice which it may adopt cannot rise superior to Acts of Congress

embodied in the Judicial Code, made in pursuance of the Constitution of the United States, which Constitution itself provides:

“This Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.” (Article VI, § 2.)

But, says counsel for Fletcher, the only remedy lies in the Surrogates' Court. Its judgment cannot be impeached, except in that Court. It is submitted that under the facts of this case, this argument cannot avail the appellee. The general rule is thus stated by Bigelow in his standard work on Estoppel: The rule he says, “appears to be that a judgment *obtained* by fraud may be impeached, not that a judgment may be impeached *for* fraud, and the true question is of the meaning of the term ‘fraud’ within that rule.” (At page 218.)

Thus, in the early English case of *Loyd v. Mansell*, 2 Peere Williams, 74 (1722), a decree had been obtained by an affidavit that the defendant was beyond the seas, whereas as a matter of fact, defendant was then living publicly in the next county town. The decree obtained upon this affidavit was sought to be pleaded in bar in a suit by the defendant in the prior case. The Chancellor held in answer to the objection that the decree could not be impeached collaterally that “such a gross fraud “as this was an abuse on the Court and sufficient to set “any decree aside.”

In *Mandeville v. Reynolds*, 68 N. Y. 528 (1877), the Court of Appeals of New York has most emphatically adopted this principle.

“Fraud and imposition invalidate a judgment “as they do all acts, and may be alleged, whenever

“the party seeks to avail himself of the results of
 “his own fraudulent conduct by setting up the
 “judgment the fruits of his fraud. * * *

“Judgment obtained by fraud upon a Court,
 “binds not such Court or any other, and its nullity
 “upon that ground though it has not been set aside
 “or reversed, may be alleged in a collateral pro-
 “ceeding. * * *

“But the Code of Procedure has, by its enact-
 “ments, taken away most, if not all of the reasons
 “of the rule which forbade the impeachment of a
 “judgment collaterally. Now in an action at law,
 “matter which was formerly of equitable cogni-
 “zance solely, may be set up and given in evi-
 “dence. * * *

“If there was an action at law upon a judg-
 “ment, could not the defendant answer in plead-
 “ing, and show in proof, that it was procured by
 “fraud and imposition? (*Pendleton v. Weed*, 17
 “N. Y. 72.) So, then, if in action at law, on some
 “cause of action to which a valid judgment would
 “be a good defence, it were set up and proven,
 “could not the plaintiff prove in reply, that it was
 “got by fraud or collusion of the defendant and
 “others than the plaintiff?” (At pp. 543-544.)

The importance of the adoption of this rule by the New York Courts resides in the well known consideration that the full faith and credit clause of the Federal Constitution requires only that such credit be given to a judgment of a State as would be given to that judgment in the Courts of that State. Accordingly, the decision of the Court of Appeals of New York, and on writ of error of the Supreme Court of the United States, in the case of *Hovey v. Elliott*, 145 N. Y. 126 (1895), and 167 U. S. 409 (1897), are, it is submitted, absolutely on all fours with, and decisive of, the case at bar. Therein, a decree had been obtained in the Supreme Court of the District of Columbia, based upon an order of that Court requiring the defendant therein

to comply with a certain order. In default of such compliance, the Supreme Court directed that the defendant was guilty of contempt, and that his answer should be stricken from the files and a decree *pro confesso* entered. The Court of Appeals of New York held that the decree thus obtained was void, and could not be relied on as establishing *res judicata* in a suit brought in that Court. The following statement of the law was approved:

“It is an axiom of the law that judgments entered without any jurisdiction are void and will be so held in a collateral proceeding, and there is a strong and growing tendency in all the Courts to hold that although a Court had jurisdiction over both the person and the subject-matter, but did not have jurisdiction to enter the particular judgment entered in the case, such judgment is void and may be collaterally impeached.” (At p. 140.)

On writ of error to the Supreme Court of the United States it was held that every defendant has a constitutional right to be heard, that lack of jurisdiction in a Court to hear a case, or where the jurisdiction had attached, lack of jurisdiction to enter a default decree, could be collaterally inquired into by the Court of another State. It was further held that the authority to strike the answer from the files did not exist, and the judgment of the Court of Appeals of New York refusing to treat as *res judicata* the decree of the Supreme Court of the District of Columbia was affirmed.

It is unnecessary to dilate upon the fact that no successful distinction can be drawn between the entry of a default decree because an answer is stricken from the file, and the entry of a default decree on the ground of the nullity of an answer filed in accordance with the Judicial Code.

III. The Surrogates' Court had no jurisdiction over Brown and Schermerhorn, because of defective extra-territorial service appearing on the face of the Record.

A reference to the record (pp. 228, 229) will show the order of extra-territorial service obtained upon Brown and Schermerhorn, and the affidavit as to the nature and extent of the service made.

The provisions of the New York Code of Civil Procedure governing extra-territorial service of process in the Surrogates' Courts at the time when the citation was issued were as follows (Code § 2524) :

“Where an order, directing the service of a
 “citation without the State, or by publication, is
 “made as prescribed in either of the last two sec-
 “tions, the party applying therefor must produce
 “proof by affidavit or otherwise, to the satisfac-
 “tion of the Surrogate, that the case is one of
 “those specified in those sections. The order
 “must direct that service of the citation, upon the
 “person named or described in the order, be made
 “by publication of the citation in two
 “newspapers, designated as prescribed in
 “this article, unless from the petition it
 “appears that the estate amounts to less
 “than two thousand dollars, in which case, only
 “one newspaper shall be designated, for a speci-
 “fied time, which the Surrogate deems reasonable,
 “not less than once in each of six successive weeks;
 “or at the option of the petitioner, by delivering a
 “copy of the citation, without the State, to each
 “person so named or described, in person, and if
 “the person to be served is an infant under the
 “age of fourteen years, also to the person with
 “whom he is sojourning or, if the service is made
 “upon a corporation, to an officer thereof speci-
 “fied in sections 431 or 432 of this act. It must
 “also contain either a direction that on or before
 “the day of the first publication, the petitioner de-
 “posit, in a specified post office a copy of the cita-

"tion and of the order, contained in a securely
 "closed postpaid wrapper, directed to the person
 "to be served, at a place specified in the order,
 "and if the person to be served is an infant un-
 "der the age of fourteen years, a further copy,
 "likewise contained in a securely closed postpaid
 "wrapper, directed to the person with whom such
 "infant is sojourning, or a statement that the
 "Surrogate being satisfied by the affidavit upon
 "which the order was granted, that the petitioner
 "cannot, with reasonable diligence, ascertain a
 "place or places where the person to be served
 "would probably receive matter transmitted
 "through the postoffice, dispenses with the de-
 "posit of any papers therein."

The order of publication was as follows:

"Upon filing the verified petition of Austin B.
 "Fletcher as Testamentary Trustee for Conrad
 "Morris Braker, under the Last Will and Testa-
 "ment of Conrad Braker, Jr., late of the County
 "of New York, deceased, by which the petitioner
 "has made proof to my satisfaction that Frank L.
 "Rabe, New York Finance Company, John A. S.
 "Brown, Frank E. Schermerhorn, as Trustee for
 "Clara Schermerhorn, under the Last Will and
 "Testament of Clara Schermerhorn, deceased, and
 "Charles Z. Wolff claim some interest in the trust
 "fund mentioned in clause 14 of the will of said
 "deceased to be accounted for in this proceeding;
 "and that Frank L. Rabe, John A. S. Brown,
 "Frank E. Schermerhorn, and Charles Z. Wolff
 "are not residents of this State; and it further
 "appearing by the affidavit of William P. S. Mel-
 "vin, verified March 20, 1912, that personal ser-
 "vice of the citation herein cannot, with due dili-
 "gence be made upon them within the State,

"Now, on motion of William P. S. Melvin, of
 "counsel for the said Austin B. Fletcher, as
 "Trustee, etc., petitioner, it is hereby

"ORDERED, that the service of the citation in
 "the above-entitled matter upon the aforesaid
 "persons, namely, Frank L. Rabe, John A. S.

"Brown, Frank E. Schermerhorn, as Trustee for
 "Clara Schermerhorn, under the Last Will and
 "Testament of Thomas Cunningham, deceased,
 "and Charles Z. Wolff, be made by publication
 "thereof in two newspapers, to wit: in the New
 "York Law Journal, published in the County of
 "New York, and in the New York Commercial,
 "published in the County of New York, once a
 "week for six successive weeks, or, at the option
 "of the petitioner, by delivering a copy of the ci-
 "tation to each of the above-named persons in
 "person without the State, and it is further

"ORDERED AND DIRECTED, that on or before the
 "date of the first publication, the petitioner de-
 "posit in the post office at the County of New
 "York, City of New York, sets of a copy of the ci-
 "tation and of this order, each set contained in a
 "securely sealed, postpaid wrapper, directed to
 "the following persons respectively at the place
 "designated below: Frank L. Rabe, at 5109
 "Chester Avenue, Philadelphia, Pa.; John A. S.
 "Brown, at 1524 No. 17th Street, Philadelphia,
 "Pa.; Frank E. Schermerhorn, as Trustee for
 "Clara Schermerhorn, under the Last Will and
 "Testament of Thomas Cunningham, deceased, at
 "416 So. 45th Street, Philadelphia, Pa.; Charles
 "Z. Wolff, at 739 Lehigh Avenue, Philadelphia,
 "Pa." (Record, pp. 228-229.)

The affidavits of service are as follows:

"Edwin F. Crane, being duly sworn, says
 "that he is over the age of twenty-one years; that
 "he made service of the annexed citation in the
 "above-entitled proceeding on John A. S. Brown,
 "whom deponent knew to be the person mentioned
 "and described in said citation, by delivering to
 "and leaving with him personally a true copy of
 "said citation on the 12th day of April, 1912, at
 "Room 701 Franklin Bank Building, Philadel-
 "phia, Penn."

"Safford A. Crummey, being duly sworn,
 "says that he is over the age of twenty-one
 "years; that he made service of the annexed cita-

“tion in the above-entitled proceeding on the persons named below whom deponent knew to be the persons mentioned and described in the citation, by delivering to and leaving with each of them personally a true copy of said citation, as follows: On the 10th day of April, 1912, at the office of Smith-Furbish Company, Kensington, Philadelphia, Penn., on Frank E. Schermerhorn; and at the office of the State Insurance Department, in the Arcade Building, in the City of Philadelphia, Penn., on Charles Z. Wolff.” (Record, pp. 230-231.)

It is admitted that the order of publication was drawn in accordance with the Code. It provides, briefly stated, for service in one of two modes, (a) by newspaper publication, or (b) at the option of Fletcher by personal service outside of the State on Brown and Schermerhorn, and by an additional order, mailing the copy of the citation and of the order to Brown and Schermerhorn.

The order was not complied with. Publication was not attempted, nor alleged. The alternative plan was adopted. But the order of the Court in this regard was only carried out to the extent of personal service beyond the jurisdiction, and the mailing expressly ordered by the Court was not complied with. This is beyond doubt a technical question. It is submitted that it is not so technical as a defence of *res judicata* founded on a default judgment. It is indeed a matter of fundamental right. Service of process upon non-residents is in derogation of the general rule requiring service within the jurisdiction of the Court issuing it, and the order for such service must be strictly and literally complied with. As was said in the case of *Guaranty Trust Company v. Green Cove etc. R. R. Co.*, 139 U. S. 137 (1891):

“When, therefore, by legislation of the State “constructive service of process by publication is

“substituted in place of personal citation
 “every principle of justice exacts a strict and literal compliance with the statutory provisions.
 “. . . Later cases to the same effect are: *Earle v. McVeigh*, 91 U. S. 503; *Settlemier v. Sullivan*, 97 U. S. 444; *Cheely v. Clayton*, 110 U. S. 701; *Applegate v. Lexington, etc., Mining Co.*, 117 U. S. 255, and there is scarcely a State in the Union “in which the same principle has not been announced and reaffirmed.” (At p. 148.)

Therein the State statute had required publication once a week for four months, and the notice was only published for nineteen consecutive weeks, without reference to calendar months, and the Court held that this operated to deprive the Court of jurisdiction, saying:

“We think the publication of the notice in this “case for the full period required by law was necessary to the validity of the decree, pronounced “upon the basis of such publication, *Early v. Doe*, “16 How. 610, and as such publication was not “made for that period, the decree based upon such “notice was no estoppel of the plaintiff in this “case.” (At p. 148.)

It is possible to multiply instances establishing the principle this case illustrates. In *North Star Lumber Company v. Johnson*, 196 Fed. 56 (1912), a judgment obtained in an Oregon State Court was held void by the United States District Court, under the following facts: The statute pertaining to extra-territorial service provided that it should be made by an order of Court based upon an affidavit. No defect was urged in the order of Court. The defect in the affidavit was that it was made before a Notary Public of another State, and not properly certified. The Court held that the affidavit was therefore a nullity, and that it operated to destroy the judgment reached by the State Court. In the recent case of *Korn v. Lipman*, 201 N. Y.

404 (1911), the order directed that the copy of the Summons should be deposited in the New York Post-office. As a matter of fact it was deposited in a mail chute connected with a mail box. Said the New York Court of Appeals:

“Substituted service when provided by statute “is in derogation of such general rule, and consequently the directions thereof must be strictly “construed, and fully carried out to confer any “jurisdiction upon the Court.” (At p. 406.)

In *Gay v. Ulrichs*, 136 N. Y. App. Div. 809 (1910), under a similar state of facts the same decision was made.

In the case at bar, the order of the Court was not complied with; and whether the reason was a good reason or a bad reason is wholly immaterial.

In the District Court this principle was held not applicable by Judge Holt on two grounds, first, that it was unnecessary under the decisions that the service should be made both by personal service and by mailing, and second, that the appearance of Brown and Schermerhorn in the Federal Court cured the defect. The difficulty with this position is that the appearance in the State Court was only a special appearance (Record, p. 260) and although an appearance was filed with the answer in the Federal District Court (Record, p. 266), yet, inasmuch as these documents were not treated by Fletcher, nor by his counsel, nor by the Surrogate, as being before that Court, they cannot be relied upon here to constitute the very appearance, for want of which the default judgment was entered. If it were possible in any Court to maintain that the provisions of the Judicial Code are not authoritative and binding, and that pleadings filed in accordance therewith in a District Court of the United States while a suit is

in such Court pending remand, may be treated as absolute nullities, then surely those same pleadings cannot be relied upon to give jurisdiction. As an elementary principle of law, equity, and of justice, no party will be permitted to maintain at one and the same time absolutely adverse and inconsistent positions. Counsel for the appellee, it is submitted, cannot at the same time urge that the default judgment was properly entered for want of an answer on the ground that that answer was a nullity, and at the same time be heard to urge that the answer and appearance therewith filed constituted such an appearance as gave jurisdiction to the Court for want of such appearance and answer entered the default judgment. Either the proceedings in the Federal District Court become a part of the record on remand of the State Court or they do not. If they do, then no default occurred; if they do not, then there was no appearance in the Surrogate's Court which waived the defective service. The alternatives are perfect, and Fletcher and his counsel are estopped to maintain inconsistent positions here. Whatever the force and effect of the early cases cited by the learned trial Judge, which were cases permitting a Court to direct in its discretion one of several methods of service, the matter is certainly disposed of by the cases of *Gay v. Ulrichs*, 136 N. Y. App. Div. 809 (1910), and *Korn v. Lipman*, 201 N. Y. 404 (1911), *supra*. Whatever options may exist with respect to alternate methods of service, it is essentially true that the actual order of service must be strictly followed. The order itself gave to Fletcher an option as to whether he would serve by publication, or by personal service; but it further provided that whichever he did, he must also serve by mailing. This additional order with respect to mailing was not complied with, and it is submitted that the Surrogates' Court therefore acquired no jurisdiction.

IV. The decree could not constitute *res judicata* because it was not a final decree.

In addition to the foregoing reasons why the decree of the Surrogates' Court pleaded as *res judicata* in the case at bar cannot be so upheld, is the fact that it was *not* a *FINAL* decree.

In *Black on Judgments* (Vol. 2, §509, 2nd Ed.), the proposition is stated in the following words: "It is 'well settled that the doctrine of *res judicata* applies 'only to final judgments, not to interlocutory judgments or orders which the Court which rendered them 'has power to vacate or modify at any time.'"

That this is a correct statement of the principle appears from the case of *Aurora City v. West*, 74 U. S. (7 Wall.) 82 (1868), in which Mr. Justice Clifford said:

"Unless a final judgment or decree is rendered in a suit the proceedings in the same are never regarded as a bar to a subsequent action." (At p. 93.)

and from *Metropolitan Elevated R. R. Co. v. Manhattan Elevated R. R. Co.*, 11 Daly (N. Y.) 373 (1884), in which the Court said:

"No order that the Court did make in that proceeding could have the force of an adjudication, because the doctrine of *res judicata* does not apply to interlocutory judgments, or orders which the Court that rendered them has power to vacate or modify at any time." (At p. 441.)

In the Surrogates' Court proceeding, within eight days after the entry of this default decree, a motion to vacate, set aside and annul the same was made in the Surrogates' Court and an order to show cause why the relief prayed should not be granted, coupled with a stay of proceedings in the following words, made by the said Court:

"It is further ordered that pending the argument upon the motion noticed by this order to show cause and the entry of an order thereupon that the said Austin B. Fletcher as testamentary trustee and his attorney be stayed from proceeding under or pursuant to said decree of August 2, 1912." (Order, Record, pp. 309-10. Affidavit upon which Order was granted, Record, pp. 310-14.)

The point for determination in this branch of the case is whether a decree stayed by an order duly entered for the purpose of passing upon a motion as to whether or not the said decree should be vacated, annulled and set aside, is such a final decree as renders it *res judicata*.

Railroad Company v. Bradleys, 74 U. S. (7 Wall.) 575 (1868), would seem to bear upon this point. Said the learned Chief Justice:

"On the 6th of March and, as we understand, during the term at which the decree was rendered, a motion to rescind was made in behalf of the complainants, and was heard and decided.

"There is no doubt that, during the term, the decree was, at all times, subject to be rescinded or modified, upon motion, and could not, therefore, be regarded as absolutely final until the end of the term. It became final, in this case, when the motion to rescind had been heard and denied." (At pp. 577-8.)

So in *Brockett v. Brockett*, 43 U. S. (2 How.) 238 (1844), where a petition had been filed by the defendants to have the decree opened, Mr. Justice Story said:

"The final decree of the 10th of May was suspended by the subsequent action of the Court; and it did not take effect until the 9th of June" (at which time the Court refused to open). (At p. 241.)

And in *Memphis v. Brown*, 94 U. S. (4 Otto) 715 (1876), Mr. Chief Justice Waite:

"Under the ruling in *Brockett v. Brockett*, 2 How. 241, the motion made during the term to set aside the judgment of March 2nd suspended the operation of that judgment, so that it did not take final effect for the purposes of a writ of error until May 20th, when the motion was disposed of. In addition to this, the form of the entry of May 20th is equivalent to setting aside the judgment of March 2nd, and entering it anew as of that date. This the Court had the right to do during the term." (At pp. 717-18.)

That a similar proposition is true in cases of applications for rehearing and motions for a new trial made with due diligence has often been held.

In *Bierce v. Waterhouse*, 219 U. S. 320 (1911), it was said (Mr. Justice Lurton):

"The record shows that thereupon a petition for rehearing was filed, and that a rehearing was denied April 29, 1905, . . . and that the final judgment, which was reversed by this Court, was not rendered until May 6, 1905, a date after the law referred to. The effect of the pending petition for a rehearing, if filed in due time and entertained by the Court, as was the case, was to prevent the judgment from becoming final and reviewable until disposed of." (At pp. 336-37.)

It is clear from the record that the decree was itself stayed, and held subject to being vacated. The Surrogates' Court indubitably had control of the decree, and it would seem both impracticable and beyond reason to say in one breath that the decree of August 2nd was final, when at the same time by the order of August 10th such decree was stayed, and a rule to show cause why the same should not be vacated was outstanding. Could an appeal have been taken from the decree while the order to show cause was outstand-

ing? Can that decree, the consideration and validity of which was in the breast of the Surrogate at the time of the entry of the decree, be held to be final and to constitute *res judicata* of the controversy herein? These questions, it is submitted, answer themselves when the record and the order of August 10, 1912, are examined.

C. Six Defences Embodied in Original Answer.

The original answer of Fletcher set up six defences as matter of law, which had, however, been previously the subject of demurrer. In addition, the defendant urged at the final hearing that the evidence offered of the documentary title of Brown and Schermerhorn was technically defective. It would seem proper, although counsel are not aware how far argument may be pressed on these points, to consider them in this brief. They will therefore be taken up *seriatim*, but with brevity.

I. The first affirmative defence (so-called in the answer) is the setting up of a suit by Conrad Morris Braker in the Supreme Court of New York for the cancellation of the assignment made by him to Frank L. Rabe. The parties defendant to this suit were Rabe and the New York Finance Company, but not complainants, in whom the record title was vested since December, 1906 (Record, p. 175). It is such elementary law that proceedings in a suit are not evidence against persons who are not parties therein that it is unnecessary to do more than refer to the point. If the matter were to be argued more fully, it would also be pointed out that the only parties interested are complainants, that the action to set aside a sale must have, to give it any validity, the present holders of the title as parties to such suit.

II. The second defence is that Conrad Morris Braker, and Austin B. Fletcher, are both citizens of the State of New York, that complainants are the assignees of Conrad Morris Braker, that Conrad Morris Braker, the original assignor, could not maintain a suit against the defendant, and that therefore under Sec-

tion 24 of the Judicial Code, paragraph I, his assignees, complainants, cannot.

This point is fully disposed of by the decision of this Court in *Brown v. Fletcher et al.*, *supra*, reported in 235 U. S. 589 (decided January 5, 1915, in advance reports for January 20, 1915).

III. The third defence is that the bill of complaint does not state a cause of action. It is sufficient to refer again on this head to the case of *Waterman v. Canal-Louisiana Bank &c. Company*, *supra*, and to the quotation already made in this brief on page 25, *supra*.

IV and V. The fourth and fifth defences are to the effect that the New York Finance Company and Conrad Morris Braker are necessary parties. These defences are fully discussed under subdivision III of this brief, page 16 *et seq.*

VI. The sixth defence is that the bill is multifarious. This averment is evidently due to a misapprehension. The assignment by the New York Finance Company to complainants as collateral security for the debt due them of \$10,000 also contained an assignment of another interest of Conrad Morris Braker under the will of Conrad Braker, Jr., deceased. This interest was therefore recited and explained because it appeared in the title papers. No relief of any kind was asked with respect to any other interest except the \$10,000 legacy. As a matter of fact and of law it would seem that a bill to enforce the payment of two legacies made under the same will, and held by the same trustee would not be multifarious, but even this question is not presented by the record.

**D. The Muniments of Title Were Proved in Accordance
With the Rules of Evidence.**

There remains for consideration the objection of appellee to the formal proof of the documents constituting the title of Brown and Schermerhorn. The Court, if it has doubt upon this subject, is asked to examine the original documents. These various exhibits constituting title are as follows, and it may not be amiss to set forth in detail the authority sustaining the technical proof offered.

Exhibit No. 1—Assignment—Conrad Morris Braker to Frank L. Rabe, dated June 13, 1901. (Text, Record, pp. 26-30, Recordation and Indorsements, Record, p. 164.) The signature of Conrad Morris Braker was identified by Mr. Burr. (Record, p. 141.) This instrument is evidence because the signature so proved was in accordance with section 961b of the New York Code of Civil Procedure. It is also evidence because it is acknowledged in accordance with section 937 of the New York Code of Civil Procedure.

Exhibit No. 2—Assignment—Conrad Morris Braker to Frank L. Rabe, dated April 18, 1901. (Text, Record, pp. 31-35, Recordation and Indorsements, Record, pp. 165-166.) The signature of Conrad Morris Braker was identified by Mr. Burr. (Record, pp. 141-142.) This instrument is evidence because the signature so proved was in accordance with said section 961b of the Code of Civil Procedure. It is also evidence because it is acknowledged in accordance with said section 937 of the Code of Civil Procedure.

Exhibit No. 4—Assignment—Frank L. Rabe to New York Finance Company, dated October 1, 1901.

(Text, Record, pp. 36-38, Certification of Notary's signature, Recordation and Indorsements, Record, pp. 167-168.) The signature of Frank L. Rabe was identified by Mr. Burr. (Record, p. 142.) This instrument is evidence because the signature so proved was in accordance with section 961b of the Code of Civil Procedure. It is also evidence because it is acknowledged in accordance with section 937 of the Code of Civil Procedure, which requires that the instrument be acknowledged in the same manner as a conveyance is acknowledged. An examination of section 299 of the Real Property Law of New York, and of the certificate of the prothonotary of the courts of Philadelphia, attached to the acknowledgment, shows that the instrument was acknowledged as a conveyance of real property.

Exhibit No. 5—Assignment—Frank L. Rabe to New York Finance Company, dated January 4, 1907. (Text, Record, pp. 38-42, Certification of Notary's signature, Recordation and Indorsements, Record, pp. 169-170.) The signature of Frank L. Rabe was identified by Mr. Burr. (Record, pp. 142-143.) This instrument is evidence because the signature so proved was in accordance with said section 961b of the Code of Civil Procedure. It is also evidence because it is acknowledged in accordance with said section 937 of the Code of Civil Procedure, which requires that the instrument be acknowledged in the same manner as a conveyance is acknowledged. An examination of section 299 of said Real Property Law, and of the certificate of the prothonotary of the courts of Philadelphia, attached to the acknowledgment, shows that the instrument was acknowledged as a conveyance of real property.

Exhibit No. 6—Assignment—John A. S. Brown and Frank E. Schermerhorn, as Trustee, etc., to Charles Z. Wolff, dated May 6, 1911. (Text, Record,

pp. 47-52, Certification of Notary's signature, Recordation and Indorsements, Record, pp. 171-172.) The signatures of John A. S. Brown and Frank E. Schermerhorn, as Trustee, etc., were identified by Mr. Burr. (Record, p. 143.) This instrument is evidence because the signatures so proved were in accordance with said section 961b of the Code of Civil Procedure. It is also evidence because it is acknowledged in accordance with said section 937 of the Code of Civil Procedure, which requires that the instrument be acknowledged in the same manner as a conveyance is acknowledged. An examination of section 299 of said Real Property Law, and of the certificate of the prothonotary of the courts of Philadelphia, attached to the acknowledgment, shows that the instrument was acknowledged as a conveyance of real property.

Exhibit No. 7—Assignment—Charles Z. Wolff to John A. S. Brown, and Frank E. Schermerhorn, as Trustee, etc., dated May 6, 1911. (Text, Record, pp. 52-57, Certification of Notary's signature, Recordation and Indorsements, Record, pp. 173-174.) The signature of Charles Z. Wolff was identified by Mr. Koppenhoefer. (Record, pp. 159-160.) This instrument is evidence because the signature so proved was in accordance with said section 961b of the Code of Civil Procedure. It is also evidence because it is acknowledged in accordance with said section 937 of the Code of Civil Procedure, which requires that the instrument be acknowledged in the same manner as a conveyance is acknowledged. An examination of said section 299 of the Real Property Law, and of the certificate of the prothonotary of the courts of Philadelphia, attached to the acknowledgment, shows that the instrument was acknowledged as a conveyance of real property.

Exhibit No. 8—Assignment—New York Finance Company to John A. S. Brown, and Frank E. Schermerhorn, as Trustee, etc., dated December 19, 1906. (Text, Record, pp. 43-46, Recordation and Indorsements, Record, p. 175.) This instrument was proved by offering in evidence the book from the Recorder's office showing the instrument. (Record, pp. 139-140.) It was executed and acknowledged in accordance with said section 309 of the Real Property Law, recorded in accordance with section 32 of the Personal Property Law of New York and offered in evidence in accordance with section 935 of said Code of Civil Procedure.

Upon this point, attention of the Court might also be drawn to the fact that as a condition for the granting of the motion to amend the answer by the introduction of the additional defence of *res judicata*, the minutes contain this direction of the Court: "It is understood that the entire record, everything connected with the case, may be submitted." The affidavit on which the default decree was obtained in the Surrogate's Court, therefore, appears attached to the petition for rehearing. It was not included in the original documents submitted before the Examiner at a time when no defence of *res judicata* had been interposed.

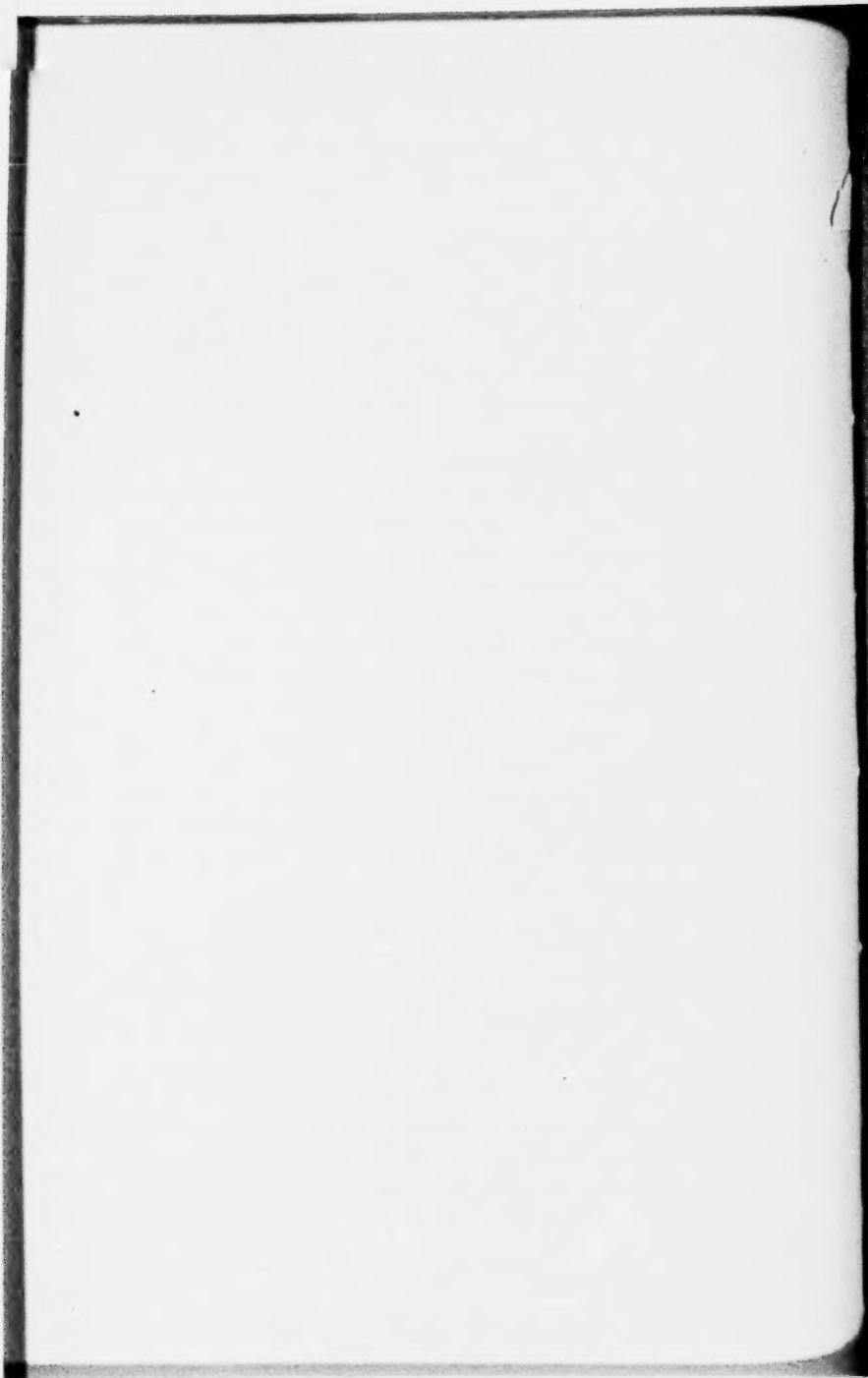
E. Conclusion.

In conclusion, while it is the clear policy of the law to discourage litigation which has already been submitted to a judicial tribunal and has been determined, it is equally a fundamental of civilized jurisprudence that every man is entitled to his day in Court. In the case at bar, stripped of all technicalities, we have presented as complainants parties who, having begun their litigation in the Federal Court in accordance with the right given them by the Federal Constitution, when an effort to evade that jurisdiction was made, complied strictly with the requirements of the Act of Congress known as the Judicial Code. Notwithstanding these facts, by an affidavit which may be charitably described as misleading, without notice, and in utter disregard of the complainants' compliance with the provisions of the Judicial Code, defendant obtained a default decree in the Surrogate's Court. It is submitted that such judgment cannot avail him, whether the appeal be made to broad principles of justice, or to technical rules of practice attempted to be analyzed in this brief.

It is respectfully submitted that the decree dismissing this bill should be reversed, and that a decree should be entered in favor of the complainants in accordance with the prayers of the bill.

Respectfully submitted,

CHARLES H. BURR,
Solicitor for Appellants,
328 Chestnut Street,
Philadelphia, Pennsylvania.



To All

Whom it May Concern

IN THE

Supreme Court of the United States

IN EQUITY:

JOHN A. B. BROWN and FRANK E. SCHER-
MERHORN, as Trustee, &c.

Petitioners,

vs.

AUSTIN B. FLETCHER, as Testamentary Trust-
ee of CONRAD MORRIS BRAKER,

Respondent.

ON WRIT OF HABEAS CORPUS.

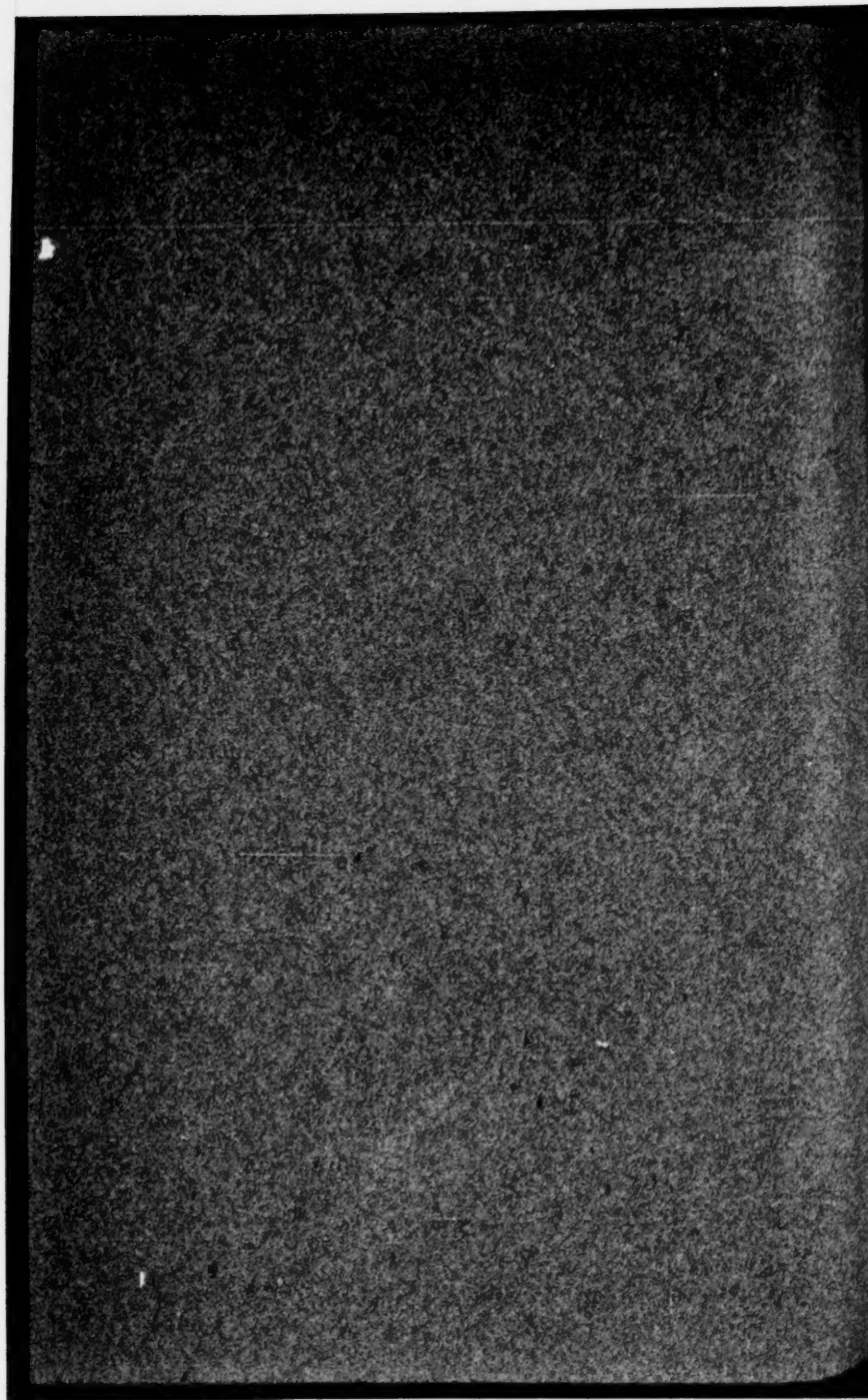
Brief on Part of Respondent.

WILLIAM P. S. MELVIN,

Counsel for

Austin B. Fletcher, as Trustee.

Respondent.



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IN THE
Supreme Court of the United States

OCTOBER TERM, 1914—No. 286.

JOHN A. S. BROWN and FRANK
E. SCHERMERHORN, trustee for
Clara Schermerhorn, under the
last will and testament of
Thomas Cunningham, deceased.
Petitioners-Complainants,

vs.

AUSTIN B. FLETCHER, as Testa-
mentary Trustee of Conrad
Morris Braker, under the last
will and testament of Conrad
Braker, Jr., deceased,
Respondent-Defendant.

In Equity.

**BRIEF ON BEHALF OF THE RE-
SPONDENT-DEFENDANT.**

Statement of the Case.

This suit was brought in the Circuit Court of
the United States for the Southern District of New

York, shortly before the Judicial Code went into operation.

It was brought to recover from the defendant, as a testamentary trustee, an amount (\$10,000) being a part of a trust fund yet remaining undistributed in his hands, held by him for the benefit of a *cestui que trust*, one Conrad Morris Braker.

While the trust was being administered, the said beneficiary assigned over to a third person (Bill, Par. Ninth) a large portion of the trust fund, and by a series of *mesne* assignments (Bill, Par. Fifteen and Sixteen) a certain part thereof is alleged to have passed into the hands of complainants.

The bill of complaint (Rec., pages 1-57) alleged the making of the will under which the trust was established; the appointment of the defendant as testamentary trustee for its continued administration; the chain of assignments of parts of the corpus of the trust; the call by complainants upon the defendant, trustee, for the payment of the last portion of the fund remaining payable, and the prayer that the complainants be declared entitled to possession of the \$10,000 and general relief.

A demurrer (Rec., page 71) to the bill was interposed setting forth as grounds thereof that the complainants were not entitled to the relief sought; that the bill on its face showed that the complainants had an adequate remedy at law; that the *cestui que trust* and the New York Finance Company (a *mesne* assignee) were necessary parties, and, moreover, that a suit was then pending in the Supreme Court of the State of New York, of which the complainants had notice, to determine the validity of the original assignment.

The demurrer was overruled (Rec., page 78) with

leave to answer by the District Court,—the Judicial Code having then gone into operation.

An answer (Rec., pages 101-109) was thereupon served pleading the judgment which had then been recovered in the suit in the Supreme Court, and which had been referred to in the demurrer as pending, by which the original assignment had been declared usurious and void; pleading that the court had not jurisdiction to take cognizance of the cause, and reiterating in further defence that the said Finance Company and the *cestui que trust*, Conrad Morris Braker, were necessary parties, and that the bill of complaint did not state facts sufficient to constitute a cause of action.

After issue joined and before hearing, a proceeding was instituted by the trustee for a judicial settlement of his accounts respecting said trust in the Surrogates' Court of the County of New York. In this proceeding the complainants were cited and were served with the citation (Rec., pages 214-242). On the return day of the citation complainants filed their petition and bond (Rec., pages 250-265) in the Surrogates' Court for the removal of the cause to the U. S. District Court, and it was thereupon removed. The bond proving defective the Surrogates' Court permitted an amended bond (Rec., pages 266-289) to be filed in its stead, the record having already been filed with the Clerk of the District Court.

An application was thereupon made (Rec., pages 281-285) to the District Court that the cause be remanded to the Surrogates' Court, and, after argument an order (Rec., page 297) was made remanding the cause. No step was then taken by the complainants to open their default in appearing in the

Surrogates' Court, and in absence thereof a decree was entered by default on their part and the petitioner and accountant in the proceeding was directed by the decree of the Surrogates' Court to pay the trust fund to the *cestui que trust*, Conrad Morris Braker.

When the present suit in the District Court came on for hearing a motion was made and granted (Rec., pages 317-320) permitting an amendment of the answer by setting up as an additional defense the said decree of the Surrogates' Court.

The hearing resulted in the decree of the District Court (pages 321-341) dismissing the bill.

An appeal was taken by complainants from the decree of the District Court to the Circuit Court of Appeals, where the decree was modified by directing the court below to dismiss the bill, but not upon the merits (see opinion, page 362). The decision of the court was based on jurisdictional grounds. First, that the District Court could take no cognizance of the suit under the provisions of section 24 of the Judicial Code; Second, that the complainants had a full, adequate and complete remedy at law, and Third, that the *cestui que trust*, Conrad M. Braker, was a necessary party defendant.

The first of these jurisdictional questions has been disposed of by the determination of this court in the cases of *Brown vs. Fletcher*, and *Provident Life, &c., vs. Fletcher* (Nos. 454, 455, on the present calendar).

ARGUMENT.**I.**

The bill of complaint shows upon its face that the suit should have been brought on the law side of the Court.

The objection that the complainants had an adequate remedy at law was one of the grounds of the demurrer herein (Rec., page 71).

The bill adds nothing to its efficacy by the bare allegation in its 23rd paragraph that complainants

“are without adequate remedy in the premises to and by the strict rules of the common law, and can only obtain relief in this Honorable Court, where matters of this nature are properly cognizable and relievable.”

Such a “jurisdiction clause,” as it was called, could be omitted under the former Equity Rules (Rule 21); but the present Rules of Practice in Equity require, at least,

“a short and plain statement of the grounds upon which the court’s jurisdiction depends” (Rule 25).

When the present bill of complaint is critically examined it will be seen that no special equitable relief is prayed for. The action itself is ordinary in its character. It is brought simply to obtain a judgment for the payment of the sum of \$10,000, a trust fund then long past due and payable. The

bill sets forth with great particularity the fact of the establishment of the trust out of which the sum was payable; the appointment of Mr. Fletcher, the defendant, as trustee thereof; the assignment by Conrad M. Braker, the *cestui que trust* of the trust fund to a certain individual, and the subsequent *mesne* assignments by which the complainants claim to be entitled to the fund; and finally, it shows that by the terms of the trust the sum is due and payable, and demands judgment that it be paid over to them. All this was simply setting forth an ordinary legal claim as distinguished from an equitable one.

The requirement in equity that a bill show the need for equitable relief is paramount in its character. It is a most important rule of equity pleading that the bill disclose the necessity of application to a court of equity for relief. The rule as stated in Story's Eq. Pl., is:

"Whatever may be the object of the bill, the first and fundamental rule which is always indispensable to be observed, is that it must state a case within the appropriate jurisdiction of a court of equity. If it fails in this respect, the error is fatal in every stage of the cause, and can never be cured by any waiver of course of proceeding by the party."

The Honorable Judge, who wrote the opinion herein in the Circuit Court of Appeals, said:

"The complainants ask for the payment of a sum of money concededly in the defendant's hands which they allege has been assigned to them. There is no ground whatever of equit-

able jurisdiction stated in the bill, nor any equitable relief prayed for. The right asserted is completely cognizable and enforceable at law and the defendant has a right to a trial by jury" (Rec., page 363).

The Judicial Code, Sec. 267, emphatically declares that:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate and complete remedy may be had at law."

The assertion of this ancient equitable principle has appeared in the United States Revised Statutes from the earliest days of the federal courts. Its enactment and re-enactment by Congress is very significant. Mr. Justice Bradley, in *Guaranty and Indemnity Co. vs. Water Co.* (107 U. S., 205; 27 l. e., 484), said:

"This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the court."

It is submitted, in view of the fact that state courts of law and courts of equity may sometimes have concurrent jurisdiction, that nevertheless in federal courts suits should never be retained in equity where the remedy may be had at law,—that the emphatic utterance by Congress disposes of such possibility.

Looking at the bill to ascertain, if possible, why the suit is brought in equity, it would seem that

there is no reason apparent other than (1) that the suit is against a *trustee*, or (2) that it has to do with an *equitable assignment*.

If those reasons are insufficient then it follows that the plaintiffs have a plain, adequate and complete remedy at law.

1. Counsel for plaintiffs cites a few cases to sustain a theory that because there is an *element of trust* in the case that fact confers jurisdiction. He refers among others to the case of Oelrichs vs. Spain (15 Wall., 211), and quotes from the case the proposition that an *element of trust* confers jurisdiction. But the accompanying text shows that the learned Court declared that "looking into the record it is clear to our minds not only that the remedy at law would not be as effectual as the remedy in equity, *but we do not see that there is any effectual remedy at all at law.*"

In Fowle vs. Lawrason's Executor (5 Peters, 495), the question before the court of equity was as to its jurisdiction in a matter of an accounting. The defendant urged that the plaintiff had a plain and adequate remedy at law. Mr. Chief Justice Marshall declared that "in all cases in which an action of account would be a proper remedy at law, and in all cases where a *trustee is a party*, the jurisdiction of a court of equity is undoubted.

The report of the case shows that the suit was based solely upon an accounting between parties where there was no question of a trust, and it would seem that the supplementary expression was *obiter*. Undoubtedly where there is a fiduciary relation existing between parties there is an *element of trust*, but as between the plaintiffs and

the defendant here what element of trust exists? Certainly a relation of debtor and creditor presents no *element of trust* in the legal sense.

The plaintiffs also quote extensively from the case of *Clews vs. Jameson* (182 U. S., 461). In that case it is important to observe that the complainants claimed a portion of a sum of money deposited by them in the hands of a committee to whom it had been entrusted and the claim was made that they were entitled to it *pursuant to the conditions of the trust*. The case is one that shows that differences arose between the committeemen, or the trustees, and their *cestuis que trust* which is altogether different from the case before the court. Here there is no contractual relation between the plaintiffs Brown and Schermerhorn and the defendant Fletcher. The trust relation which existed between him and his *cestui que trust* has not passed by the latter's assignment so as to exist between him and the plaintiffs. So far as they are concerned he is simply the holder of a sum of money which they claim as matter of law he should pay to them by right of their purchase from the *cestui que trust*, Braker. What was said in the case of *Marvin vs. Brooks* (94 N. Y., 71), and quoted in the above case of *Clews vs. Jameson*, is pertinent here. The New York Court, in speaking of the propriety of an accounting in equity for a sum of money intrusted to an agent, said: "The jurisdiction was placed upon the ground of a *fiduciary or trust relation* and it was held that a court of equity had jurisdiction over *trusts and their fiduciary relations which partake of that character*, and in such cases the right to an accounting is well established, but it was held that

the existence of a *bare agency* was not sufficient. It must be an agency *coupled with some distinct duty* on the part of the agent in relation to funds or some specific property. Here Mr. Fletcher, the defendant, holds the funds, but what "distinct duty," it may be well asked, does there exist on his part towards Messrs. Brown and Schermerhorn?

It has been held that when all that remains to be done with reference to a trust fund is the payment of an ascertained sum, the beneficiary may sue his trustee *at law* for money had and received or to recover the trust fund.

22 Ency. Pl. & Pr., 138.

McCrea vs. Purmont, 16 Wend., 460.

Varet vs. N. Y. Ins. Co., 7 Paige, 560.

N. Y. Ins. Co. vs. Roulet, 24 Wend., 505.

Tateum vs. Ross, 150 Mass., 440.

Webb vs. Faller, 77 Me., 568.

After the termination of a trust, *assumpsit* lies to recover money in the trustee's hand.

Underhill vs. Morgan, 33 Conn., 105.

Howard vs. Tatterson, 72 Me., 57.

Frost vs. Redford, 54 Mo. App., 345.

Lynde vs. Davenport, 57 Vt., 597.

Of course, the assignee of a trust fund occupies relatively the same position as the *cestui que trust*, who has made the assignment; and if the latter may sue at law for the recovery of the money, surely the assignee may do so.

2. Are the complainants seeking to maintain this suit on the ground that it has to do with an

equitable assignment? We concede that the original assignment from Braker to Rabe (Par. 14th of Bill) is what is so denominated. But as shown by Point III following we do not concede the same for the assignment from the N. Y. Finance Company to the complainants, which is erroneously described in the Bill of Complaint (Par. 16th), but shown correctly in the exhibit therein referred to ("G" Rec., page 43). Consequently, what follows in this point is by way of argument aimed at what is supposed to be the complainants' view, namely, that their Bill is in equity because they claim under an *equitable assignment*.

While the original assignee and the successive transferees took that assignment or chose in action, subject to all the equities that existed between the original parties (6 Am. & Eng. Ency., 662, sub nom. "Equitable Assignments" and cases cited), the assignment simply entitles the holder to every remedy, lien or security that might have been available to the assignor as a means of payment.

2 White vs. Tudors Ldg. Cas., 4th Am. Ed., 1667.

Bank vs. Fordy, 1 Penn. State, 454.

Craig vs. Parkis, 40 N. Y., 181.

Wilson vs. Bowdin, 26 Ark., 157.

Coffing vs. Taylor, 16 Ill., 457.

Perry vs. Robert, 30 Ind., 244.

Schleiman vs. Bowdin, 36 Minn., 198.

In bringing suit the assignee may now generally sue in his own name *at law*. Equity will not, as a rule, entertain a bill simply to recover the debt.

Bisphams Eq., 227, 4th Ed.

Story Eq., Jurisp.

Chic. R. R. vs. Nichols, 57 Ill., 466.

Hayward vs. Andrews, 106 U. S., 672; 27 l. e. 271.

Guaranty Co. vs. Water Co., 107 U. S., 205; 27 l. e. 484.

Goodwin vs. Lloyd, 8 Port. (Ala.), 237.

Dickenson vs. Burr, 15 Ark., 372.

Batchelder vs. Jenness, 59 Vt., 104 .

The right of the assignee of a *chose in action* to sue at law furnishes to him such a plain and adequate remedy as will preclude him from filing a bill in equity or from obtaining relief therein, in the absence of any allegation to show that he had no adequate or complete remedy at law. There must be some allegation showing that the assignment was denied by the assignor; or that the assignor claimed the fund in question, or that he, in some way, objected to payment, or that there is a controversy between the assignor and the assignee.

Angel vs. Stone, 110 Mass., 54.

When the equitable title is not involved in the litigation and the remedy is sought merely for the purpose of enforcing the legal right of the assignor, *there is no ground for an appeal to equity*; because the disputed right may be perfectly vindicated in an action at law. From this it follows, as a general rule, that *unless special circumstances render it necessary for the assignee to go into a court of equity to prevent a failure of justice*, the mere fact of the assignment, or the fact that the inter-

est of the assignee is an *equitable one*, will not give him a right to invoke the jurisdiction of a court of equity.

N. Y. Guaranty Co. vs. Water Co., 107 U. S., 214; 27 l. e. 484.

Glenn vs. Marbury, 145 U. S., 499; 31 l. e. 790.

Hayward vs. Andrews, 106 U. S., 672; 27 l. e. 271.

VII Ency. Pl. & Pr., 742.

The assignee of a *chose in action*, as a patent right, with claims of damages for its infringement, cannot proceed by bill in equity to enforce for his own use, the legal right of his assignor, merely because he cannot sue at law in his own name; he has a plain and adequate remedy by an action in the name of his assignor.

Hayward vs. Andrews (106 U. S., 672; 27 L. ed., 271).

Mr. Justice Matthews in this case said that the simple question was whether the assignee of a *chose in action* may proceed by bill in equity to enforce for his own use the legal right of his assignor, merely because he cannot sue at law in his own name. He refers to Walker vs. Brooks (125 Mass., 241) to the effect that "a court of equity will not entertain a bill by the assignee of a strictly legal right, merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy."

So, too, in New York Guaranty & Ind. Co. vs.

Memphis Water Co. (107 U. S., 205; 27 L. ed., 484), the rule that an assignee of a *chose in action* or any other *cestui que trust* cannot, merely because his interest is an equitable one, proceed in a court of equity for the recovery of a demand, was enforced, following the decision in *Hayward vs. Andrews* (*supra*). Mr. Justice Bradley referred to that case and the decision therein, reiterating the rule that the assignee of a *chose in action* on which an adequate and complete remedy at law exists, cannot, merely because as such assignee his interest is an equitable one, bring a suit in equity for the recovery of the demand. He declared that such an assignee must bring an action at law in the name of the assignor to his own use. "This," he said, "is true of all legal demands standing in the name of a trustee and held for the benefit of *cestuis que trust*—and he refers to many cases besides those mentioned in *Hayward vs. Andrews*."

II.

Conrad Morris Braker, the *cestui que trust*, is a necessary party.

The learned justice of the Circuit Court of Appeals, says in his opinion (Rec., page 364) as to this need:

"Treating the action as one in equity we think the objection that Conrad M. Braker ought to have been made a party was good. He was within the jurisdiction of the court, and a decree in favor of the complainants

could have affected his interests most injuriously. Therefore the bill should have been dismissed because he was not brought in as a party."

By the demurrer herein (Rec., page 71) the objection is:

"That it appears by the said bill that there are divers other persons who are necessary parties thereto. In particular it so appears that the said Conrad Morris Braker, referred to in the said bill, of the City of New York, the *cestui que trust* of the said defendant, Austin B. Fletcher, as testamentary trustee under the will of Conrad Braker, Jr., is a necessary party to said bill:"

Judge Hand of the District Court in overruling the demurrer said (page 77):

"The parties omitted are proper but not necessary parties."

The defendant in answering repeated the objection, as a defence, that Conrad Morris Braker was a necessary party without whose presence a proper decree could not be made, giving his residence in New York City, with particularity (Rec., page 108).

The Bill shows the need of Braker's presence in the suit. Its object is to take from the hands of his trustee by the judgment of the court the trust fund held under a provision of the will of Conrad Braker, Jr.

But before any suit could be brought against him he should be apprised of the facts of these alleged assignments.

No allegation is made in the bill that it was brought home to the knowledge of the trustee that the *cestui que trust* had assigned the trust fund to Rabe nor that by sub-transfers it had passed into the hands of the complainants. It cannot be said that the trustee had constructive notice of the fact of such assignments simply because they appear to have been recorded in the Register's or Surrogate's office, in the County of New York. No proof was offered of the effect in law of such recording, and if it had been proffered it would have been shown that the recording of such instruments simply saved them from being void as against any subsequent purchaser in good faith and for a valuable consideration whose conveyance is first duly recorded.

"All persons interested in the object of a suit whose rights will be directly affected by the decree must be made parties to the suit."

McArthur vs. Scott, 113 U. S., 340; 28 l. e., 1031.

Story vs. Livingston, 13 Peters, 375.

In suits affecting trust property, whether brought by the trustee or against him, the beneficiaries as well as the trustee must be made parties.

Cary vs. Brown, 92 U. S., 171; 23 l. e., 469.

Justice Miller in Barney vs. Baltimore (6 Wall., 280; 18 l. e., 825) speaks as follows:

"There is another class of persons whose relations to the suit are such that if their inter-

est and their absence are formally brought to the attention of the Court, it will require them to be made parties if within its jurisdiction, before deciding the case; but if this cannot be done, it will proceed to administer such relief as may be in its power between the parties before it. And there is a third class whose interest in the subject matter of the suit and in the relief sought are so bound up with the other parties that their legal presence as parties to the proceeding is an absolute necessity without which the Court cannot proceed. In such cases the Court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction."

In the case of *Batesville Institute vs. Kauffman*, 18 Wall., 151, referred to in petitioner's brief there is no question of relative rights of trustee and *cestui que trust*. There the matter was simply a transfer of a debt. So, too, in the case of *Fid'y and Deposit Co. vs. Fid'y Trust Co.*, 143 Fed. Rep., 152. The matter has to do simply with an assignment of certain rights by a receiver.

III.

To enable the complainants to maintain this action they must show an unbroken chain of title vesting fully and absolutely in them the interests of Conrad Morris Braker, the Cestui Que Trust, in the trust fund in the hands of the trustee.

The bill of complaint avers the making of the original assignment from Braker to Rabe; the

transfer of the same from Rabe to the New York Finance Company, and then the conditional assignment or pledge of the same by the New York Finance Company to Brown and Schermerhorn, or, rather, to be more precise, the assignment of the *moneys* coming to the Finance Company under and by virtue of the assignment from Braker to Rabe; then it avers the transfer or assignment of the moneys and interests thereunder by Brown and Schermerhorn to Wolff; and, finally, the transfer or reassignment of those interests back from Wolff to Brown and Schermerhorn. The transfer from Brown and Schermerhorn to Wolff was alleged to be consequent on a sale to him at public auction of the property or interest pledged (Record, page 10), and in the assignment the sale and transfer is stated to be "freed and discharged from any equity of redemption."

The defendant, Austin B. Fletcher, claims that this sale was of *different property* from that pledged; that the transfer from the New York Finance Company to Brown and Schermerhorn is unaffected by the subsequent auction sale; that the sale itself was simply a pretended sale and a sham, and that, so far as he is concerned, the assignments based thereon from Brown and Schermerhorn to Wolff and from the latter back to themselves, are nullities, and that since this auction is based upon a title derived through such transfers the complaint must be dismissed.

The Record shows (page 12) that a promissory note for \$10,000 was made by the New York Finance Company to Brown and Schermerhorn in 1906, and that it became payable upon the same day that the balance of the trust fund would become payable, namely, July 21, 1910.

When we look at the promissory note we see that it is an instrument dated at New York City and payable at No. 11 Broadway, Borough of Manhattan, City of New York (Record, page 42).

The assignment accompanying this note (Record, Ex. "T," page 43), was also executed in New York City.

This whole contract then of loan and pledge was a *New York contract*. The contract of pledge was made and to be performed in the State of New York and the rights of the parties were consequently governed by the laws of that State.

Hiscock vs. Varick Bank (206 U. S., 28; 51 l. e., 952).

The note provided that on non-performance of the promise, or upon default in the payment of the interest for the space of fifteen days, authority was given to sell "any and all of the certain part of all the right, title and interest of the New York Finance Company in and to the aforementioned estate of Conrad Braker, Jr., deceased, as is *particularly described in the aforementioned assignment*, at public or private sale, at the option of the holders hereof, and with or without notice."

The Bill alleges (par. 18th) that the complainants, under the authority given them by the note and collateral assignment, caused the "*aforementioned collateral*" to said note to be sold at public sale in Philadelphia, and that it was so sold to Charles Z. Wolff for \$2,000.

The note in its body recites as follows: "Having pledged herewith as collateral security (1) a certain part of all its right, title and interest in and

to the estate of Conrad Braker, Jr., deceased, *as by the certain assignment bearing even date herewith will more fully and at large appear*, and (2) two certain policies of insurance of the Equitable Life Assurance Society of the United States upon the life of one Conrad Morris Braker."

Consequently we must look at the assignment accompanying the note (Complainant's Ex. "G," page 43) to ascertain precisely what it was that was pledged as collateral security, and what it was that the pledgees could sell upon default of the N. Y. Finance Co.

We find there (page 45) that it was "*any and all monies coming to it (N. Y. Finance Co.) under and by virtue of the aforementioned assignment, bearing date of June 13th, 1901 (Braker to Rabe of interest under 14th section of will) and also a one-half part of any and all monies coming to it under and by virtue of the aforementioned assignment, bearing date of April 18th, 1901, and duly assigned to the said New York Finance Company as hereinbefore particularly recited and set forth (assignment of Braker to Rabe of interest under 15th and 16th sections of will) * * * and also all and every its estate, right, title and interest in and to such moneys or any part thereof.*"

Evidently, then, what was given in pledge as security for the payment of the note was *all the moneys* that should be paid over to it (the Finance Company), under the assignment turned over to it by Rabe relating to the trust under the 14th Section of the will of Conrad Braker, Jr., *and one-half of the moneys that should be paid over to it under the assignment turned over to it by Rabe relating to the trusts under the 15th and 16th sec-*

tions of that will. In other words, the Finance Company intended that all the *moneys* payable under the said assignments of June 13, 1901, and of April 18, 1901, should, in the first instance, pass into its hands, and that it would then, in turn, pay over all or part of them, as the case might be, to Brown and Schermerhorn. The Finance Company in that manner reserved to itself all right, title and interest under the assignments giving only to Brown and Schermerhorn the proceeds, or a part of the proceeds, of the *money* acquired by it out of the assignments.

And this is further indicated by the fact that by the terms of the power of attorney (Record, page 45) contained in the assignment the Finance Company appointed Brown and Schermerhorn, its attorneys with power of substitution, and gave to them full power and authority to sue for, recover and receive such interests, *but the exercise of the power should always be in its (the Finance Company's) name, or in the name of its successors or assigns.*

Another important reason for this assignment of the *moneys* resulting, was that the Finance Company reserved to itself one-half of the interests relating to the 15th and 16th sections of the will, and evidently intended that if there should be necessity for suit it would conduct it in its own name, giving to the assignees the *moneys* requisite to meet the pledge.

Now, what in reality was sold at public auction, consequent on the alleged default of the New York Finance Company? The bill of complaint (par. 18) says that the "aforementioned collateral" was so sold; and, looking back to see what this col-

lateral was we find (par. 16) that the security or collateral was "a one-half part of the certain estate, right, title and interest, and *any and all monies* coming to the said New York Finance Company therefrom which had been theretofore sold and assigned by the said Frank L. Rabe to the said New York Finance Company by the aforementioned instrument dated October 1, 1901, *as by the said assignment* bearing date the nineteenth day of December, 1906 (Rec., Ex. "G," page 43) *will more fully and at large appear*. So the assignment from the Finance Company to Brown and Schermerhorn *alone* shows what could have been sold.

There is no revelation as to what was advertised to be sold (if, indeed, there was any announcement of the sale by advertisement), but looking critically at the transfer made to Charles Z. Wolff by Messrs. Brown and Schermerhorn consequent upon the auction sale of the pledge we find an important variance. The pledge as we have seen was of the *monies* coming to the pledgor by virtue of the assignments, the transfer to Wolff was of more than the *monies*, it was

"the certain part of all the right, title and interest of the New York Finance Company in and to the Estate of Conrad Braker, Jr., deceased, to wit, a *one-half part* of the certain estate, right, title and interest, and *any and all monies* coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date of April 18th, 1901, and by the said Frank L. Rabe duly assigned and transferred

to the said New York Finance Company, by a certain instrument in writing, bearing date of October 1st, 1901; and also the certain part of all the right, title and interest of the New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to wit: the certain estate, right, title and interest and *any and all moneys* coming to the said New York Finance Company therefrom, assigned and transferred by Conrad Morris Braker to Frank L. Rabe, by a certain instrument in writing, bearing date of June 13th, 1901, and by the said Frank L. Rabe, duly assigned and transferred to the said New York Finance Company by a certain instrument in writing, bearing the date of October 1st, 1901, as by the certain assignment bearing date the 19th day of December, 1906, will more fully and at large appear, free and discharged from any equity of redemption" (Record, pages 49, 50).

It will be seen that the deed given consequent upon the auction sale comprehended things different from those that were pledged.

Moreover, the sale was not in accordance with the law. It is of primary importance that the sale of a pledge should be such as to bring the largest bid possible. While the note provides that the sale may be a public or private one, without notice, of course if the pledgees elected to sell the property at public sale, they should then have adopted such methods as are commonly used at a sale at public auction, giving appropriate notice thereof to the public, and selling it where the contract of pledge was made, upon the assumption that *there a*

greater sum would be realized than if the pledged thing were sold in a foreign and obscure locality.

In Massachusetts it has been held that in making such sales, reasonable skill and diligence are required, and in a case where a sale had been had of a pledge in a foreign state, the Court said :

“In making such sale one must exercise reasonable skill and diligence in order to get the value of the property.” *Neason vs. Davis*, 133 Mass., 343; *Clark vs. Simmons*, 150 Mass., 357. “This includes the fixing of a reasonable time and place of sale.” *Markham vs. Iandon*, 41 N. Y., 235, 243.

“We are inclined to think the place of sale was an unreasonable one. The pledged property consisted of over one-third of the whole number of shares in a small Massachusetts corporation, whose whole capital stock was only \$18,000. None of the stock had been sold at auction in New York, and it was not listed. It did not appear that it was known in New York. The note from which the stock was pledged, was made and delivered in Massachusetts, and was payable there and the pledge was made here. The pledgee was a New York corporation. Under the circumstances, it would have been better to make the sale in Massachusetts.”

Ginzberg vs. Downs, 165 Mass., 467.

The sale at Philadelphia plainly appears to have been a hurried one,—pretended and deceitful. Brown and Schermerhorn it may be noticed

(Record, page 86) had, a few days before (Apr. 29, 1911), received a letter advising them of the pendency in the N. Y. Supreme Court of the suit to have the assignments from Braker to Rabe, and from Rabe to the Finance Company, set aside as void and of no effect, and on May 3, 1911 (see par. 18th, Bill of Complaint), the sale was held. There were no bidders at this sale, not even the purchaser Wolff. Burr did say (as though to give the sale a *bona fide* character) that the interests assigned were "in my presence purchased by Mr. Wolff, who was the highest bidder" (page 145); but pressed in cross-examination he later testified (page 157) that he did not know that Wolff was present at the sale; that the arrangement of the sale was done entirely by his (Burr's) advice; Wolff was procured by Brown and Schermerhorn; was a "straw" man, and that no one else should bid, and that the title so fictitiously purchased should be conveyed back; what was done was that Mr. Wolff was a "straw man" to take the title from them (Brown and Schermerhorn). It appears, that agreeably with this arrangement, there were no other bidders present (Rec., 158), there was no consideration passed and Burr, finally driven by cross-examination, impatiently breaks forth, "I have tried to tell you that the man (referring to Wolff) was a 'straw man.'"

This auction sale was confessedly a sham and should be ignored by the Court as an incident in the devolution of title.

To resume, the situation resolves itself into this, that the complainants received from the N. Y. Finance Company its promissory note for \$10,000. To meet this note and by way of security it trans-

fers any and all *monies coming to it* under an assignment made by Braker to Rabe, June 13, 1901, and one-half part of any and all *monies coming to it* under an assignment made by Braker to Rabe, April 18, 1901, "and also all and every its estate, right, title and interest in and to such monies." In other words, it promised to pay its debt out of the monies coming to it by certain assignments.

We look in vain, however, for any warrant or authority for the execution of the deeds from the complainants to Wolff (Ex. "H," Rec., page 47) or for Wolff to them (Ex. "I," Rec., page 52). Both are predicated by their recitals to power and authority given under the assignment (Ex. "G"), and the fact of the default of payment of the promissory note (Ex. "F"), but neither of those exhibits contain authority for giving anything more than is mentioned in Exhibit "G," namely, the *moneys* coming to the said Finance Company. But when we examine the deed from Brown and Schermerhorn to Wolff (Ex. "H") we find that it transfers besides "any and all moneys coming to the said New York Finance Company therefore," the following:

*The certain part of all the right, title and interest of the New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to wit, a one-half part of the certain estate, right, title and interest * * * assigned and transferred by Conrad Morris Braker to Frank L. Rabe by a certain instrument in writing, bearing date April 18th, 1901, and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company*

by a certain instrument in writing, bearing the date of October 1st, 1901,"

or

"all the right, title and interest of the New York Finance Company in and to the estate of Conrad Braker, Jr., deceased, to wit, the certain estate, right, title and interest, * * * assigned and transferred by Conrad Morris Braker to Frank L. Rabe, by a certain instrument in writing, bearing date of June 13, 1901, and by the said Frank L. Rabe duly assigned and transferred to the said New York Finance Company by a certain instrument in writing, bearing the date of October 1st, 1901, as by the certain assignment bearing date the 19th day of December, 1906, will more fully and at large appear."

Examining the deed of Wolff to the complainants Brown and Schermerhorn (Ex. "I," Rec., page 52), the property conveyed is—

"all and every the estate, right, title and interest which I, the said Charles Z. Wolff now have, or hereafter may become entitled to receive, into or from the aforementioned estate of Conrad Braker, Jr., deceased, as hereinbefore more particularly mentioned and described, and also any and all moneys coming to me therefrom."

IV.

The trustee could not be called upon to recognize the assignment made by the cestui que trust or of any sub-assignment until he should have had actual notice thereof.

The bill of complaint shows that the complainants base their claim of right to the trust fund upon the fact that they are the assignees thereof by virtue of a deed from one Charles Z. Wolff. This they appear to have acquired about the 6th of May, 1911.

Nowhere in the Record will it appear that the complainants ever gave notice to the defendant that they had any claim upon the trust fund.

Whatever the effect may be as between the New York Finance Company and Messrs. Brown and Schermerhorn of the assignment (Ex. "G," Rec., page 43), the defendant trustee insists that so far as he is concerned it is a nullity, and cannot be the basis for any action at law or in equity against him on their part, neither can any of the instrumentalities or actions founded upon it subsequently made or done.

This Exhibit "G," as shown by the preceding point, is simply a covenant that the debt of the New York Finance Company shall be discharged by it out of the *moneys* coming to it out of the trust fund held by this defendant, and, besides, no notice of its existence is alleged to have been given to him.

That notice should have been immediately given is indispensable.

Spain vs. Brent, 1 Wall., 604; 17 l. e.,
625.

There was no valid equitable assignment.

Rogers vs. Hosack, 18 Wend., 319.

Hoyt vs. Story, 3 Barb., 264.

Burke vs. Child, 21 Wall., 441; 22 l. e.,
624.

Christmas vs. Russell Ex'rs, 14 id., 69;
20 l. e., 764.

V.

The New York Finance Company is a necessary party defendant.

The objection was made by the demurrer (Rec., page 72) that this company was a necessary party.

The demurrer was overruled, the Court stating that though a proper, it was not a necessary, party (Rec., page 77).

The answer interposed renewed the objection (Rec., page 108).

As a corollary to the preceding point it would appear evident that the said company has a present interest in this controversy. The defendant contends that from the plaintiff's own showing the New York Finance Company gave to the complainants simply *money*s coming to it out of the trust fund in question, and this was done by way of pledge or security for the debt evidenced by its promissory note. It is submitted that when the attempt was made to sell the collateral pledged by public sale, regard being had to the fact that the

note and pledge was a New York contract, the sale should have been in the State of New York instead of Pennsylvania, and that this vitiated all the proceedings attending it. Moreover, the pledge was of *moneys* coming to the New York Finance Company and apparently the sale and transfers consequent upon it had to do with other property. These circumstances indicate that the Finance Company should be a party.

VI.

The proof offered of the execution of the assignment of the New York Finance Company to Brown and Schermerhorn (Complainants' Exhibit "G" of the bill) is altogether insufficient.

Under the pleadings it was necessary for the plaintiffs to prove the execution and delivery of this instrument. It is a most important link in the chain of this alleged title. Its contents must necessarily be shown so that the character of the pledge under the accompanying note may be known.

The instrument itself was not produced in court.

When testimony was taken by the examiner (Rec., page 139) a witness was called on behalf of complainants, who said he was a record clerk in the New York County Surrogates' office. He produced a book of record.—Regular Conveyances and Mortgages of Interests in Decedents' Estates. He said that a record therein from page 204 to 207 was the record of an assignment.

The following then appears with reference to it by the Record (page 140) :

"Mr. Frost: I offer this record on pages 204-5-6 and the top of 207 in evidence, and ask to substitute therefor in the records before the Master a copy of the same.

Mr. Melvin: That is objected to. If the purpose be to introduce evidence of some assignment,—of any of the assignments that are described in the bill of complaint; it is objected to also because it is immaterial, incompetent and irrelevant, and not acknowledged, executed and recorded in the manner required by law.

A paper containing what purported to be a copy of the record was compared with it and found to be alike by counsel for both parties.

Mr. Frost: I ask you to have the original in the record marked in evidence, and that the copy which has just been compared be used as the copy from the record.

The original constitutes complainants Exhibit 8, and the copy is marked for identification, Complainants' Exhibit 8A.

Mr. Melvin renews his objection on the same grounds, previously stated."

This is absolutely all that appears in the Record with reference to this important document.

This was not proof of the execution of this assignment.

The rule in equity as in law is that the best proof of such a deed is by producing it, and, in this instance, showing that it was signed by the president

of the New York Finance Company and signed by him with authority.

Greenleaf on Evid., Vol. 2, Section 294;
Vol. 3, Section 308.

A statement on page 50 of petitioner's brief states that it was proved by offering in evidence the book from the Recorder's office [the Surrogates' office] showing the record of the instrument, and the statement declares that it was offered in evidence in accordance with Section 935 of the New York Code of Civil Procedure. This section does not appear in the Record, and we can hardly think that this court is obliged to take judicial notice of this Code, but were it before the Court it would be seen to apply to "conveyances," that is instruments relating to real property.

By that section a conveyance of real property acknowledged and recorded is evidence without further proof thereof, and the record is evidence with like effect as the original.

We have a somewhat similar section of the Code as to the effect of an acknowledgment of an instrument such as this relating to personal property. In the latter case while the acknowledgment obviates strict proof of execution, nevertheless it does not relieve from the need of production of the original instrument.

VII.

Messrs. Brown & Schermerhorn in taking over the assignment from the N. Y. Finance Company of the assignment transferred to it by Frank L. Rabe, were not bona fide purchasers for value. They took it subject to all equities.

In taking over this interest they were at most simply purchasers of an *equitable chose in action* and they were not embraced within the definition of bona fide purchasers.

Dupont vs. Wertheman, 10 Cal., 354.

Wailes vs. Cooper, 24 Miss., 208.

Chew vs. Barnet, 11 S. & R. (Pa.), 389.

Pinson vs. Ivey, 1 Yerk. (Tenn.), 296.

The proof is barren of any endeavor whatever on the part of these purchasers to ascertain the facts as to this remarkable sale. Had they given this any consideration they would have been astonished to observe that Braker, the *cestui qui trust*, had parted with what remained of the trust under the Fourteenth Section of his father's will (\$17,000) for a consideration of \$1.00, and likewise of his interests under the Fifteenth Section (\$35,000) for a like consideration of \$1.00. They would have insisted upon seeing Braker himself or his trustee, Mr. Fletcher, and had they done so they would have learned that these apparent assignments were simply given as security for loans that had been made. This investigation was especially requisite in the case of Schermerhorn, who was not acting in his

own interest, but in a representative capacity. He would have learned that the law did not sanction an investment by him of trust funds in a loan to a foreign private corporation on the security of a legatee's expectations, or more exactly stated, on the faith that the borrower, the New York Finance Company, would turn over in payment the *moneys* that were first to pass into the hands of that corporation. No proof was before the Court that these purchasers took the slightest pains to learn if even this alleged corporation,—the New York Finance Company, was a legally constituted body or that the instrumentalities, the note and alleged assignment, were actually and authoritatively executed by it. Any inquiry would have assured them that the assignment from Braker to Babe was given as security for a loan and that this loan, based on the legacy under the Fourteenth Section of the will had already been paid.

The law requires that those purchasing property not in the actual possession of the seller should make full inquiry, and the purchasers acquire only such rights as the grantor has, and they take subject to all the equities between the original parties.

Kinney vs. Cons. Min'g Co., 4 Sawy., 482.

Smith vs. Shane, 1 McLean, 22.

Brig Ploughboy, 1 Gall., 41.

Bin vs. N. Albany Co., 2 Biss., 390.

Lord vs. Doyle, 1 Cliff, 453.

Vermeyle vs. U. S. Ex. Co., 21 Wall, 138.

In illustration of the rule it may be said that one who purchases a mortgage without addressing a single inquiry to the maker of the bond and mortgage takes it subject to all equities.

Bush vs. Lathrop, 22 N. Y., 535 (an important case in this connection).
 Gay vs. Gay, 10 Pa., 369.
 8 P. E. Green, 78.
 Trustees vs. Wheeler, 61 N. Y., 88.
 Cutts vs. Guild, 57 N. Y., 229.

recognized as an authority in

Cowdrey vs. Vandenberg, 101 U. S., 572,

where Justice Field states the rule as follows:

"That the purchasers of non-negotiable demands, like the certificate here, from others than the original owner of them can take only such rights as he has parted with, except when by his acts he is estopped from asserting his original claim, is established by all the authorities. He must in such case as Lord Thurlow said, abide by the case of the person from whom he buys."

Cutts vs. Guild, 57 N. Y., 229;
 Ingraham vs. Dinsborough, 47 N. Y., 421;
 Bush vs. Lathrop, 22 N. Y., 535.

In a very early case Judge Spencer said:

"It is an uncontrovertible proposition that the assignee of a *chose in action* takes it subject to all the equities it was liable to in the hands of the assignor—in other words, the purchaser must abide by the case of the seller (2 Vern., 192; 1 Eq. Abr., 45; 1 Ves. Jr., 249). The assignment of an assignment acquires no

negotiable quality, and the last assignee cannot, it appears to me, be clothed with a greater title than the first."

Beebe vs. People, &c., 1 John., 552.

When Brown and Schermerhorn took over the assignment from the Finance Company they could not but have seen upon the face of the original instrument that Braker had apparently parted with an interest in his father's estate of nearly \$20,000 in value for \$1.00, and inadequacy of price has always been held sufficient to charge a party with notice.

Singer vs. Jacobs, 3 McCrary (U. S.), 638;
Hoyt vs. Hoyt, 8 Bosw., 511.

In the case of Bush vs. Lathrop (22 N. Y., 550), Judge Denio, in commenting on the *bona fides* of a purchaser, said that the assignment in question was in the chain of title which should necessarily have been looked into to ascertain the authority held by the sellers, and if it then appeared that the sale had been made for less than one-fifth of the value of the interest disposed of, it was enough in his opinion, to put an ordinarily careful person on inquiry; that the consideration was, of course, enough to support the transfer, but that the inquiry would have shown circumstances warranting its being set aside.

A purchaser of property in the possession of one not the vendor is bound to make inquiry concerning the rights of one in possession, and failing to do so is chargeable with notice, and one chargeable with notice acquires only such rights as his

grantor has and takes subject to all the equities operative against him.

Lea vs. Polk Co., 21 How. (U. S.), 493;
 Johnston vs. Glancy, 4 Blatch., 94;
 Noyes vs. Hall., 97 U. S., 34;
 Weld vs. Madden, 2 Cliff (U. S.), 584;
 Kinney vs. Con. Min. Co., 4 Sawy., 382;
 Smith vs. Shane, 1 McLean, 22.

VIII.

The judgment in the Supreme Court of Braker vs. The Finance Co. et al., operates as forcibly against Brown and Schermerhorn as if they were actually named as parties therein.

This judgment, which is set up as a first defence in the answer herein, is conclusive as to the right of Braker, the *cestui qui trust*, to the trust fund, the \$10,000, and is absolute in its direction that the trustee pay it to him. The action (Rec., pages 182-210) in which the judgment was rendered was in equity, was *in rem*, and its object was to obtain a decree declaring that the assignment from the plaintiff, Conrad Morris Braker, to Frank L. Rabe, and from him to the New York Finance Company, be declared void and that the instrument of assignment be delivered up for cancellation and that the plaintiff's right to the trust fund be settled and paid over to him (Record, page 115). The action was commenced about February 2, 1911, *prior to the institution of the present suit*. It was designed to be determinative of every interest re-

specting the trust fund. Everyone was brought into the case who was known to have asserted any claim to the fund (Record, page 110). The trustee by his answer submitted his rights to the Court. Rabe, who appeared therein, failed to plead, but the Finance Company answered at length (Record, pages 116-122), and declared under oath of its president that it was entitled to the payment of the fund. While the action was in progress the discovery was made in an examination *de bene esse* of an officer of the Company that it had made a transfer of the assignment some years before to Brown and Schermerhorn. There appears to have been something sinister in the concealment of this assignment, and in the declaration by the Company's answer (verified February 21, 1911, see Record, 177) that it was entitled to receive the fund (Record, 121), and the reiteration of its rights to the fund made in January, 1912, by its requests to find (Record, 207) submitted to the Court seven months after the verification of the bill herein (May 31, 1911, Record, 15).

It is significant that Charles H. Burr, solicitor for the complainants, has been a director, and a member of the executive committee, of the New York Finance Co. (Record, 137, 143, 145, 146), and has also represented the complainants as attorney since July 21, 1910, up to the present time (Record, 145).

Shortly after the discovery that Brown and Schermerhorn held an assignment acquired from the Finance Company, they were at once addressed and advised of the pendency of the suit to set aside the transfer from Braker as void (Record, 105).

The notification was sent to them April 29, 1911, three months after the action in the State Court was commenced, to which one of the complainants replied by a letter, dated June 3, 1911 (Record, 106, 148), in which he *admitted* that the assignment from the New York Finance Co to the complainants dated December 19, 1906 (Ex.G, Record, 43), was not then absolute, but was collateral security for the payment of the \$10,000 note of the New York Finance Co. We claim that what they should have done upon its receipt was to make themselves parties to the suit in the Supreme Court; but what they did do was to go through the form of an auction sale of the assignment on the 5th day of May, 1911, to one Wolff, who on the same day undertook to retransfer the same to Brown and Schermerhorn. We have commented on this sham sale in the latter part of Point III, and we insist that instead of having the effect to strengthen their pretended title it had quite a contrary effect, and that if there was any doubt before as to their being chargeable by *lis pendens* the fact of their being chargeable now became positive. By this sale having full knowledge of the pendency of the suit in the Supreme Court, they executed a conveyance to their dummy of all their interests in the assignment, and he received it with that knowledge being in law imputed to him, so that when they, in turn, received the transfer from him, they stood as purchasers *pendente lite* and so bound by the judgment that should be entered in the action. They sought to circumvent the endeavor being made to induce them to become parties to the action, and the result of their scheme was that they were hoist by their own petard.

They took over a title with notice of its invalidity and were bound as by *lis pendens*.

Bennett on Lis Pendens, 205.

The law is that he who intermeddles with property in litigation does it at his peril, and is as conclusively bound by the results of the litigation, whatever they may be, as if he had been a party to it from the outset.

Tilton vs. Cofield, 93 U. S., 163; 23 L. Ed., 858.

A *pendente lite* assignment is such that an assignee is bound by all that is done whether a party by name or not.

Ex par. N. and S. Ala. R. R. Co. (95 U. S., 221; 24 L. Ed., 355).

The relation and situation of a purchaser *pendente lite* is such that that his protection against the result of the pending action must be sought in it, and for that purpose he may step in and defend.

Hovey vs. Elliott, 118 N. Y., 124, 134.

And such would be the effect of the judgment *in rem*, although the purchaser is not made a party to the action.

Id., 135.

A *pendente lite* purchaser is affected with notice of the rights of parties litigant so as to render his purchase subject to the event of the suit.

Murray vs. Ballou, 1 John Ch., 566;
Leitch vs. Wells, 18 N. Y., 602.

When omitted parties have notice of the suit, their remedy is by motion or petition to be made parties, and not by independent suit.

Neale vs. Utz, 75 Va., 480.

"Sound public policy requires that different judicial decisions shall not be made on the same state of facts, and that a judgment rendered jurisdictionally and unimpeached for fraud shall be conclusive, as to the questions litigated and decided, upon the parties thereto *and their privies*, whom the judgment, when used as evidence relieves from the burden of otherwise proving, and bars from disproving the facts therein determined. * * * The principle is well settled that by notice and opportunity to defend an action the party notified becomes a party thereto so as to be included in any subsequent litigation between the same parties as to all questions determined in the action which are material to the right of recovery in the second action, and the judgment in the first action is conclusive upon the defendant in the first action, in the character of plaintiff in the second action, as to the facts thereby determined."

Fulton Co. vs. Hudson R. R. T. Co., 200
N. Y., 297.

IX.

The decree of the Surrogate's Court is conclusive. It (1) has jurisdiction of the matter before it; it (2) had jurisdiction of Messrs. Brown and Schermerhorn, and (3) the decree is a final decree.

Our Code of Civil Procedure (§2743) provides that a decree of the Surrogate's Court is conclusive upon each party who was duly cited and appeared.

1. There is no question raised that the Court did not have jurisdiction of the subject matter, the objection however is made that the court could not exercise its ordinary jurisdiction in view of the fact that at the time of the application to the Surrogate's Court for the judicial accounting by the trustee as to his administration of the trust established under the fourteenth clause of the will of Conrad Braker, Jr., there was pending in the District Court this suit of Brown and Schermerhorn. But we claim that when the trustee, Mr. Fletcher, submitted his accounts to the Surrogate's Court, charging himself with the amount on hand as thereby shown, he practically placed the trust fund in the hands of the Court and asked the Court to determine the method of its distribution. The proceeding in the Surrogate's Court was one *in rem*, and for that very reason, it became the proper forum for finally decreeing to whom the fund should be paid.

This view is in harmony with the very important case of *Waterman vs. Canal-Louisiana Bank & Tr. Co.* (215 U. S., 33; 54 L. ed., 80) quoted by peti-

tioners in their brief, and in our own behalf we also invoke it. It recognizes that the Federal Court will not interfere where the *res* is already in the possession of the State Court, and it recognizes too, the great importance of having all parties before the Court where their rights may be affected. It declares as a result of the cases

"that in so far as the probate administration of the estate is concerned in the payment of debts and the settlement of the accounts by the executor or administrator, the jurisdiction of the probate court may not be interfered with. It is also true * * * that the prior possession of the state probate court cannot be interfered with by the decree of the Federal Court. * * * The decree to be granted cannot interfere with the *possession* of the estate in the hands of the executor, while being administered in the probate court, but it will be binding upon the executor and may be enforced against it personally. * * * the decree can find the amount of the residue as determined by the administration in the probate court in the hands of the executor to belong to the complainant and to be held in trust for her, thus binding the executor *personally*."

In the summing up of the case Judge Day says:

"Upon the whole case we are of opinion that the Federal Court has jurisdiction for the purpose of ascertaining the rights of the complainants to recover as against the executor and the interest of the persons before the

Court in the fund. While the Court could make no decree which would interfere with the possession of the Probate Court, it had jurisdiction to entertain the bill and to render a judgment binding upon the parties to the extent and in the manner which we have already stated."

2. Had the Surrogate's Court jurisdiction of the persons of Brown and Schermerhorn? This question was never hinted at adversely, even remotely until more than six months after the return day of the citation. On the return day of the citation, they presented a petition for the removal of the cause to the District Court and it contained no such intimation. In the various proceedings to amend the bond, upon the application to remand; on the petition for a rehearing of the motion to remand; on the application to vacate the decree entered in the Surrogate's Court, the silence of complainants may well be said to estop them from now contending that they were not served with the citation.

The only objection they offer to the mode of service of the process is that the papers were not mailed to them in addition to being personally served upon them out of the State. The order for the service of the citation using the ordinary terms of the statute in the case of advertisement provided that on or before the first day of publication, a copy of the order and of the citation should be sent by mail to the persons so directed to be cited. Of course, the order in this particular contemplated that the method of service by means of advertising the citation should be followed, for if there should be a

personal service, logically there would be no occasion for mailing. And this is the conclusion of the Courts of this state when such or similar questions have been before them on the construction of the similar statute as to service of summons.

The order for the publication of the citation made in the Surrogate's Court followed the requirements of section 2524 of the Code, and is almost literally in the terms required by section 440 of the Code for the publication of a summons in an action. The language of both is that the order shall contain a direction "that on or before the day of the first publication," the petitioner or the plaintiff deposit in the post office, copies of the process, etc., directed to the person to be served.

The citation was personally served, but the papers were not mailed to them, and it is objected that this was a fatal omission.

The question as to the sufficiency of such service has been before our courts many times.

In *Matter of Field* (131 N. Y., 189), a statutory order was required to be served out of the state by publication in the manner provided by law for service of a summons upon a non-resident.

Judge Fitch said:

"But it is further objected that the order directing service of the order to show cause upon the non-resident defendants by a proper personal service without the state was void and ineffectual, because it did not also direct the due publication as provided by section 440 of the Code, as that section has been hitherto interpreted. * * * We do not agree with the construction which has been thus asserted. It

may be granted that it is possible, and, perhaps, even a grammatical reading of the section, but the natural and sensible construction is not that the order must direct both modes of service in every event, but while that is always proper, the order may direct the service by due publication, or may direct the service by personal delivery without the state in the manner prescribed, and an order directing either mode alone, followed by due service in that manner will be equally good with one which directs both with an option to choose either."

In *Brooklyn Trust Co. vs. Blumer* (49 N. Y., 84), followed as a controlling authority in *Pier vs. Amory* (40 Wisc., 574), the syllabus states:

"A personal service of a summons and complaint can be made out of the state only when publication is ordered. When so made, it is equivalent to publication and deposit in the post office."

The case of *Kennedy vs. Arthur* (33 St. Rep., 147) is very elucidating as to the very question before the Court. The order contained the provision for service by publication or optionally by service without the State. It failed to contain the direction for mailing on or before the first day of the publication. Judge Ingraham said:

"It is plain that it is only in the case of publication that the mailing is necessary. The summons is only directed to be mailed on or before the day of the first publication. If

such publication never takes place, the papers are never to be mailed, and, in this case, no such publication having been made, the time never arrived when (had the provision been made in the order) the papers should have been mailed. I think, therefore, it should be held on this motion that the court obtained jurisdiction over the defendant by the service out of the state."

In *Sabin vs. Kendrick* (2 App. Div., 96), Judge Willard Bartlett said:

"Counsel for appellant * * * insists, however, that when the plaintiff makes no election between the two modes of service, but inserts both provisions in the order, the omission to specify a place to which copies of the summons, complaint and order shall be directed addressed to the defendant, is a jurisdictional defect which is fatal to the order.

It does not seem to us that this view is correct. No doubt the order of publication in the present case was defective in that it merely provided for the mailing of the papers "directed to said defendants," without specifying any place to which they were to be addressed. But inasmuch as everything relating to the publication and mailing might have been omitted without affecting the validity of that part of the order which authorized the personal service of the summons without the state, we do not see how the omission of one thing relating to such publication and mailing can invalidate it. The order remained perfect as an order permitting the plaintiff to have the

summons served upon the defendant personally without the state."

In *Matthews vs. Gilleran* (35 St. Rep., 269), Gen. Term, the syllabus states:

"It is not necessary to publish or mail a copy of the summons when personal service has been made without the state."

In *McCully vs. Heller* (66 How. Pr., 468), Judge Cullen, afterwards of the Court of Appeals, states the reason very clearly:

"The order must further direct that on or before the day of the first publication, a copy of the summons, complaint and order must be sent to the defendant by mail. There is no provision that such copies shall be sent before personal service, and in the case of personal service, it is not possible to mail the copies before the first publication, because there is no publication. The object of sending the copies by mail is that such copies may reach the defendant. But why serve a copy in that manner when it has already been served, or is to be served upon the defendant personally? What is to be attained by the double service? Secondly, there is this distinction between service by publication and personal service out of the state that make the provisions as to sending copies by mail applicable in the first case, though unnecessary in the second. In the case of publication only, the summons and notice is published. The defendant who reads the publication is

apprised that an action has been instituted against him and of the parties to that action, but not as to the particular claim. Therefore, the complaint is to be mailed to him to give such information. But in the case of personal service out of the state, the summons, complaint and order must be served. Personal service out of the state is more than publication, because if only what is published, i. e., the summons and notice was served personally, the service would be a nullity. I think that neither the spirit of the Code, nor its language requires transmission by mail in this case."

3. The decree of the Surrogates' Court is a final decree. It recites all the jurisdictional facts as to the service of process, the appearance, etc., of such as appeared, the summary statement of the account and gives instructions as to the disposition of the fund.

But appellants contend that it is not final because the Surrogate, after its entry, made an order that the accountant-trustee show cause why the decree should not be vacated, and staying proceedings in the meantime.

It is not in the record, but with the same liberty in which the petitioners have indulged it may be said that the motion then made upon the order to show cause, based on a scandalous affidavit, to vacate the decree was denied, the denial being announced a few days before Judge Holt, of the District Court, handed down his decision herein.

The respondent contends that this order to show cause and the accompanying stay has not made the decree any the less a final decree. The order to

show cause was based on an affidavit which was deceitful, and, as will be shown by the succeeding point, was an audacious attempt to mislead the Surrogates' Court as to the facts in the case.

The motion to vacate the decree and the stay were simply in the line of ordinary procedure. The decree itself remained of record unaffected as to its finality until an equally solemn expression of the Court should have annulled it. The order for the stay simply operated, as the application for it designed, to prevent for the nonce the payment of the trust fund to the *cestui que trust*.

So, by parity of reasoning, an appeal taken from a judgment does not prevent its being regarded as final, or suspend its operation as an estoppel.

Parkhurst vs. Berdell, 110 N. Y., 386.

Wright vs. Wright, 72 id., 153.

Nor an application for a new trial.

Hubbell vs. U. S. (171 U. S., 203; 43 L. Ed., 138).

X.

The petitioners, by their attorney and counsel, have endeavored to deceive the Surrogates' Court, and by the incorporation of the records of the Surrogates' Court are trying to affect the mind of this court.

The second part of B (pages 29-30) in the brief of the petitioners is devoted to an endeavor to con-

vince this Court that the decree in the Surrogates' Court was obtained by a fraud practiced upon the Court by the attorney for the respondent.

It would be enough, perhaps, to say that the decree having been obtained after due service of the citation is unassailable in a collateral action; that the only remedy for the appellants if there were irregularity or other cause to object to in its entry, the remedy must be sought in that Court, but where, as here, the whole brief is a slanderous attack upon the attorney, it is proper he should say something lest silence would be interpreted as an inability to answer.

With an apology to the Court the following brief statement is submitted:

After the decision of the motion to remand the cause was made, an order was entered and it contained the statutory instruction (see 28, Judiciary Code) that it be "immediately carried into execution." The order was settled upon notice and thereupon a certified copy thereof was filed in the Surrogates' Court.

It goes without saying that it became at once after the signing of the order a matter demanding activity on the part of Brown and Schermerhorn. They did nothing. They should have hastened to enter their appearance in the Surrogates' Court and applied to be allowed to file an answer if they intended to contend, but a week passed by without anything being done and consequently the decree was entered by defendant.

About a week after its entry their application was made to vacate the decree, and it will be seen by the affidavit of Burr (Rec., pages 310-314) that he sought to impress the Court with the belief that

there was a wilful suppression of the fact that they had entered their appearance and had filed an answer, and that the affidavit of regularity was false in stating that they did not appear. But the Record will show that their appearance was only made in the District Court and their answer was filed therein.

On a remand of a cause no papers in the Federal Court are returned to the State Court. The appearance in the Federal Court while a submission to the jurisdiction of that Court does not become an appearance in the State Court; nor did its answer become an answer in the State Court, and counsel for petitioners knew it, and never intended that it or the appearance should become operative in the Surrogates' Court. And instead of misleading the Surrogates' Court by inviting the belief that the appearance made in the District Court was to be considered as if made in the Surrogates' Court, he should have frankly avowed that its purpose was solely for its use in the District Court. On page 329 of the Record speaking of the appearances in the Surrogates' and District Courts in complainants' petition for rehearing they say.

"Surely it cannot be maintained that such an appearance [the special appearance in the Surrogates' Court] waived any right they had to insist on proper service in that court. The subsequent general appearance in this court on June 3, 1912, was made for the purpose of contesting the action under Federal protection, and cannot be said to amount to a general appearance in the Surrogates' Court.

After a remand the case returns to the State Court in the same condition as when the order of the removal was made, and the proceedings in the Federal Court in the erroneous exercise of Jurisdiction by removal will be treated as *null and void* by the State Court after resumption of its jurisdiction."

18 Ency. Pl. & Pr. sub. nom. "Removal of Causes," pages 377, 386.

Livinsky vs. Banking Co., 92 Fed. R., 462.

Livinsky vs. Banking Co., 37 Fed. R., 829.

It is only a question for the State Court to determine what shall be done on remand with pleadings, testimony, etc., after removal in the Federal Court.

Ayres vs. Wiswall (112 U. S., 187; 28 l. e., 694).

Birdseye vs. Schaeffer, 37 Fed., 823.

B'way Ins. Co. vs. Chi. Co., 101 Fed., 507, 510.

Doane vs. Corbin, 44 Ill. App., 463.

As said by Chief Justice Waite (in Ayres vs. Wiswall, *supra*) :

"The fact that Ebenezer R. Ayres had filed his *answer* in the United States Court is a matter of no importance. That fact of itself did not confer jurisdiction if there had been none before. It will be for the State Court when the case gets back there to determine what shall be done with pleadings filed and

testimony taken during pendency of the suit, in the other jurisdiction."

In Black's Dillon on the Removal of Causes, the writer says:

"After the cause is remanded by the Federal Court it should proceed in the State Court *as if no petition for the removal had been filed.* * * * The order of remand does not originate a jurisdiction in the State Court, nor even, properly speaking, restore a jurisdiction that was lost. It simply puts an end to the interruption of the State Court proceedings which were caused by the attempted removal" (Sec. 225).

XI.

The U. S. Circuit Court of Appeals for the Second Circuit in dismissing the bill herein, but not upon the merits, should not have imposed the costs of that court upon the defendant. Neither had that Court power upon such judgment of dismissal to leave to a judge of the District Court the question of costs of the lower court.

The Record herein shows that the Circuit Court of Appeals arrived at its determination mainly on the ground that the District Court could not take cognizance of the cause under section 24 of the Judicial Code. It thereupon modified the decree

of the District Court which had dismissed the bill of complaint with costs against the complainants, by directing the District Court to dismiss the bill but not upon the merits, and this it did with costs of the Circuit Court of Appeals to the appellants, the complainants.

These costs were very onerous amounting to \$435.59 (Rec., page 371).

The defendant after the taxation of the costs applied to the Circuit Court of Appeals (Rec., page 370) for a rehearing on the subject of costs.

The application was denied (Rec., page 373), but in denying the motion the Court ordered that the mandate that had been issued be recalled and amended by providing that the question of costs in the District Court be left to the discretion of a judge of that Court.

It is submitted to the Supreme Court that the Circuit Court of Appeals, on dismissing the bill, because the lower Court could not take cognizance thereof in view of section 24 of the Judicial Code, could not award costs to the complainants, and that for the very same reason it had no power to submit to the discretion of a judge of the lower Court the question of the costs of that Court.

Indeed the Rules of the Circuit Court of Appeals for the Second Circuit (Rule 31) except from its provisions the power of imposing costs where there is a dismissal of the suit for want of jurisdiction. Its language is:

"In all cases where any suit shall be dismissed in this Court, *except where the dismissal shall be for want of jurisdiction*, costs shall be allowed to the defendant-in-error or

appellee, unless otherwise agreed by the parties."

The language of the rule follows somewhat the language of Rule 24 of the Supreme Court only that where the dismissal in the Supreme Court shall be for want of jurisdiction "costs incident to the motion to dismiss shall be allowed."

XII.

The judgment of the Circuit Court of Appeals should be affirmed, with costs.

Respectfully submitted,

WILLIAM P. S. MELVIN,
Counsel for Respondent.

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FILED
MAR 31 1915
JAMES D. MAHER
CLERK

No. 286.

October Term, 1914.

IN THE
Supreme Court of the United States

IN EQUITY.

JOHN A. S. BROWN, a Citizen of the State of Pennsylvania,
and **FRANK E. SCHERMERHORN**, Trustee for Clara
Schermerhorn, Under the Last Will and Testament of
Thomas Cunningham, Deceased, and a Citizen of the
State of Pennsylvania,

Petitioners-Complainants,

v.

AUSTIN B. FLETCHER, as Testamentary Trustee of
Conrad Morris Braker, Under the Last Will and Testa-
ment of Conrad Braker, Jr., Deceased, and a Citizen of
the State of New York,

Respondent.

Motion, with Petition, to Postpone Argument

CHARLES H. BURR,

Solicitor for Petitioners-Complainants.



IN THE
Supreme Court of the United States.

October Term, 1914. No. 286.

IN EQUITY.

JOHN A. S. BROWN, A CITIZEN OF THE STATE OF PENNSYLVANIA, AND FRANK E. SCHERMERHORN, TRUSTEE FOR CLARA SCHERMERHORN, UNDER THE LAST WILL AND TESTAMENT OF THOMAS CUNNINGHAM, DECEASED, AND A CITIZEN OF THE STATE OF PENNSYLVANIA,

Petitioners-Complainants,

vs.

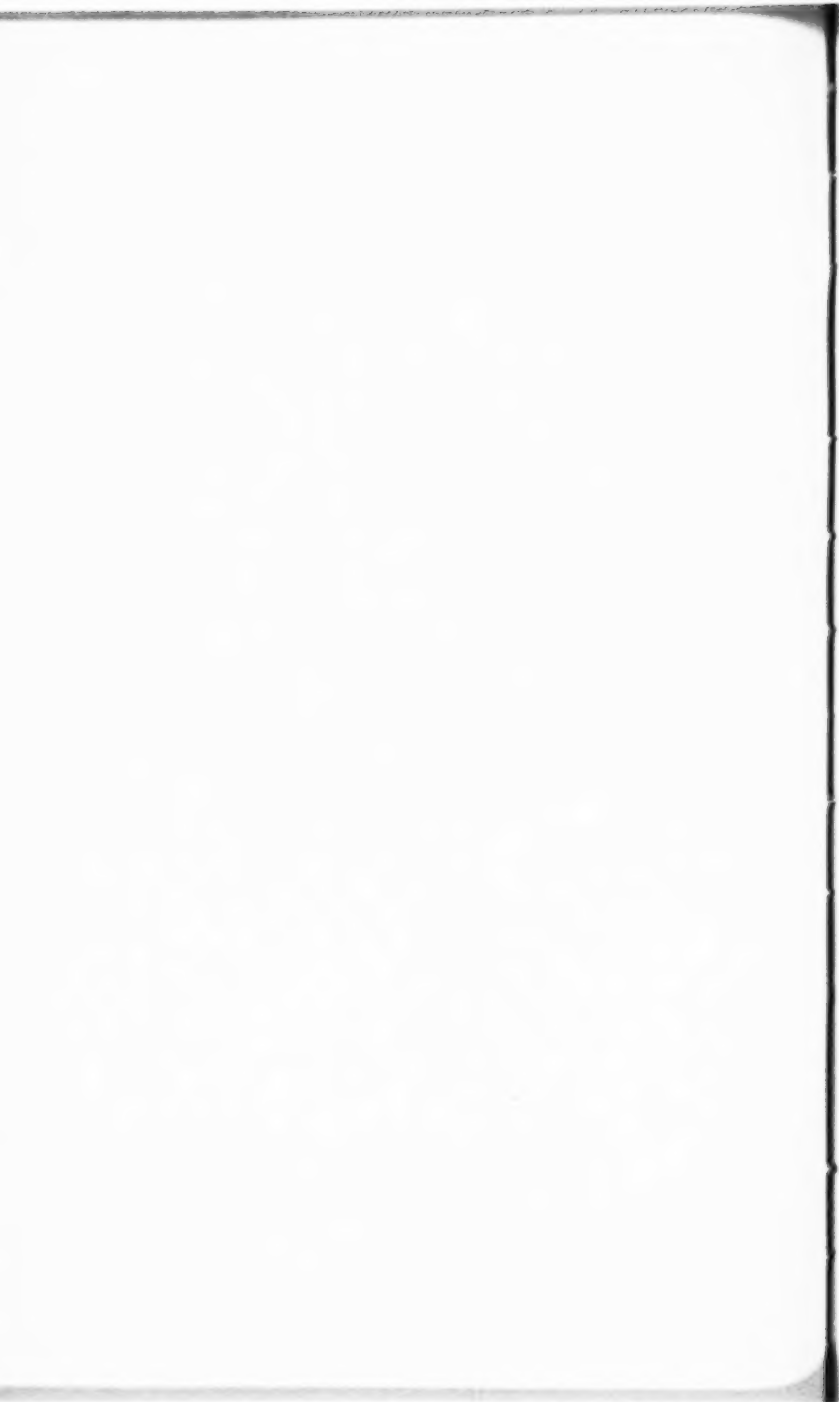
AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND A CITIZEN OF THE STATE OF NEW YORK,

Respondent.

AND NOW, this ~~twenty-ninth~~ ^{fifth} day of ~~March~~ ^{April}, 1915, come the Petitioners-Complainants, by their counsel, and move this Honorable Court to postpone the argument of this cause as particularly prayed for in their Petition filed herewith.

CHARLES H. BURR,

Solicitor for Petitioners-Complainants.



IN THE
Supreme Court of the United States.

October Term, 1914. No. 286.

IN EQUITY.

JOHN A. S. BROWN, A CITIZEN OF THE STATE OF PENNSYLVANIA, AND FRANK E. SCHERMERHORN, TRUSTEE FOR CLARA SCHERMERHORN, UNDER THE LAST WILL AND TESTAMENT OF THOMAS CUNNINGHAM, DECEASED, AND A CITIZEN OF THE STATE OF PENNSYLVANIA,

Petitioners-Complainants,

vs.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND A CITIZEN OF THE STATE OF NEW YORK,

Respondent.

PETITION TO POSTPONE ARGUMENT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petition of John A. S. Brown and of Frank E. Schermerhorn, Trustee for Clara Schermerhorn, under the Last Will and Testament of Thomas Cunningham, Deceased, respectfully represents and sheweth:

That your Petitioners are the Petitioners-Complainants in the above entitled action, which is now regularly on the Calendar of this Court, numbered 286, and which comes before the Court on a Certiorari granted to the United States Circuit Court of Appeals for the Second Circuit.

That this action was instituted by your Petitioners in the United States Circuit Court for the Southern District of New York (thereafter the District Court), in which Court jurisdiction was vested because of the diversity of citizenship of the parties to the action, the Respondent being a citizen and resident of the State of New York, and the Complainants—your Petitioners herein—both being citizens and residents of the State of Pennsylvania.

That this appeal presents questions of the original jurisdiction of the United States Courts, of conflict of jurisdiction of such Courts with the New York State Courts, and also whether certain judgments and decrees of the State Courts are *res judicata* in this action. And that all these questions are not only based on very complicated facts, but also involve many nice and intricate questions of law.

That the legal advisor and Counsel of your Petitioners in the subject matter of this action not only prior to its inception was, but ever since then has been, and still is, Charles H. Burr, Esq., a member of the Bar of the State of Pennsylvania and also of this Honorable Court, having his offices in the City of Philadelphia, in the said State of Pennsylvania. And that while another Attorney appeared also as Solicitor of Record for your Petitioners when this action was instituted, such appearance was only as a matter of convenience in the mere formal prosecution of the action, our said Counsel, Mr. Burr, in fact preparing our Complaint in this action, and appearing and acting also as our Counsel on its trial. That the said Mr. Burr also

prepared this case on our appeal to this United States Circuit Court of Appeals for the Second Circuit, the Brief which was presented on our behalf on the said appeal, and also personally made the oral argument in support of the same. That the said Mr. Burr also prepared and instituted the proceedings for the Certiorari, which was granted by this Honorable Court, and on which this action is now before this Honorable Court, for hearing and review; and also personally prepared the Brief now on file in this Court for use on such hearing, and has fully prepared himself to orally present and argue the same.

That the said Charles H. Burr was continuously absent from this Country in London, England, and Paris, France, from early in December, 1914, until about February 11th, 1915, as Counsel for the Textile Alliance, Incorporated, and for the National Association of Cotton Manufacturers, with reference to the import of dyestuffs for the mills of this Country, and also for the removal by Great Britain of its embargo on wool, all of which has been personally arranged for by the said Mr. Burr while abroad, and while acting as such counsel. That in order to perfect certain details for the importation of such wool by the said Textile Alliance, Incorporated, for the associated Woolen, Cotton and Silk Mills of this Country, the said Mr. Burr was unexpectedly compelled again to sail for England on March 6th, 1915; and that the said matters will detain him abroad and prevent his return to this Country until about April 15th, 1915.

That your Petitioners are advised and verily believe that it is probable this action will be reached on the regular call of the Calendar of this Honorable Court, before the said April 15th, 1915.

Your Petitioners further respectfully allege and say that the said Mr. Burr is their only Counsel in this action; that he alone is acquainted and familiar with

the intricate questions of law and fact involved herein, and with the brief and oral argument to be presented in connection therewith on this appeal. That it is impossible properly and fairly to present your Petitioners' appeal to this Honorable Court without the said Mr. Burr's personal presentation thereof; and that to compel such presentation, or even a submission of said appeal, in his absence, would be inequitable, unjust and unfair to your Petitioners, and unquestionably would be to their detriment, and probably to their great loss and damage.

That your Petitioners do not make this Petition with any intent, or purpose to hinder, or unnecessarily delay the disposal of the pending appeal before this Honorable Court; but, on the contrary, solely that the matters at issue may be fairly and properly presented, and your Petitioners' rights fully preserved and protected.

Wherefore, your Petitioners respectfully pray this Honorable Court, that it may order, either that this case shall be put on the regular day calendar of this Honorable Court for hearing on some certain and fixed day a reasonable time after the proposed time of the return of the said Mr. Burr to this Country, or that the same shall only be placed on such calendar on a reasonable notice by either party hereto, after the said Mr. Burr shall actually have returned here.

And your Petitioners will ever pray.

JNO. A. S. BROWN,
FRANK E. SCHERMERHORN,
As Trustee for Clara Schermerhorn, Under the Last Will and Testament of Thomas Cunningham, Deceased.

CHAS. H. BURR,
Solicitor for Petitioners.

STATE OF PENNSYLVANIA, } ss.:
 COUNTY OF PHILADELPHIA, }

JOHN A. S. BROWN and FRANK E. SCHERMERHORN as Trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, deceased, being duly sworn, depose and say, that they are the Petitioners named in the foregoing Petition by them subscribed, and that the statements therein made are true, as they verily believe.

Sworn to and sub- scribed before me this / 9 th day of March, 1915.	}	JNO. A. S. BROWN,
		FRANK E. SCHERMERHORN,
		<i>As Trustee for Clara Schermerhorn, Under the Last Will and Testament of Thomas Cunningham, Deceased.</i>

GEORGE KOPPENHOEFER, JR.,
 (Seal) Notary Public.

328 Chestnut Street, Philadelphia, Pa.

My commission expires March 10, 1917.

IN THE
 Supreme Court of the United States.

October Term, 1914. No. 286.

IN EQUITY.

JOHN A. S. BROWN, A CITIZEN OF THE STATE OF PENNSYLVANIA, AND FRANK E. SCHERMERHORN, TRUSTEE FOR CLARA SCHERMERHORN, UNDER THE LAST WILL AND TESTAMENT OF THOMAS CUNNINGHAM, DECEASED, AND A CITIZEN OF THE STATE OF PENNSYLVANIA,

Petitioners-Complainants,
vs.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND A CITIZEN OF THE STATE OF NEW YORK,
Respondent.

Sir:—

You are hereby notified that JOHN A. S. BROWN and FRANK E. SCHERMERHORN, Trustee for Clara Schermerhorn, under the last Will and Testament of Thomas Cunningham, Deceased, the above-named Petitioners-Complainants, upon their verified Petition, and a copy of the entire record in this cause, and also upon all the proceedings had herein, on Monday the ~~29~~⁵th day of ~~March~~^{April}, 1915, at the opening of the Supreme Court of the United States, at its Court-Room at the Capitol, in

the City of Washington, D. C., will submit to the said Supreme Court of the United States, the foregoing Motion and Petition for a postponement of the argument of this cause; true and correct copies of which are herewith delivered to you.

Dated March 19th, 1915.

CHARLES H. BURR,

Solicitor for Petitioners-Complainants.

To WM. P. S. MELVIN, Esq.,

Solicitor for Austin B. Fletcher, as Testamentary Trustee of Conrad Morris Braker, Under the Last Will and Testament of Conrad Braker, Jr., Deceased, a Citizen of the State of New York, Respondent.

Due service of the foregoing notice and delivery of a copy of the foregoing Motion and Petition for a postponement of the argument of this cause is hereby admitted on this 20th day of March, 1915.

WILLIAM P. S. MELVIN,

Solicitor for Respondent.



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No. 286.

October Term, 1914.

Office Supreme Court, U. S.
FILED
APR 3 1915
JAMES D. MAHER
CLERK

IN THE
Supreme Court of the United States

IN EQUITY.

JOHN A. S. BROWN, a Citizen of the State of Pennsylvania,
and **FRANK E. SCHERMERHORN**, Trustee for Clara
Schermerhorn, Under the Last Will and Testament of
Thomas Cunningham, Deceased, and a Citizen of the
State of Pennsylvania,

Petitioners-Complainants,

vs.

AUSTIN B. FLETCHER, as Testamentary Trustee of
Conrad Morris Braker, Under the Last Will and Testa-
ment of Conrad Braker, Jr., Deceased, and a Citizen of
the State of New York,

Respondent.

**ADDITIONAL AFFIDAVIT IN SUPPORT OF
PETITION TO POSTPONE ARGUMENT.**

CHARLES H. BURR,
Solicitor for Petitioners-Complainants.

IN THE
Supreme Court of the United States

October Term, 1914. No. 286.

IN EQUITY.

JOHN A. S. BROWN, A CITIZEN OF THE STATE OF PENNSYLVANIA, AND FRANK E. SCHERMERHORN, TRUSTEE FOR CLARA SCHERMERHORN, UNDER THE LAST WILL AND TESTAMENT OF THOMAS CUNNINGHAM, DECEASED, AND A CITIZEN OF THE STATE OF PENNSYLVANIA,

Petitioners-Complainants,

v.

AUSTIN B. FLETCHER, AS TESTAMENTARY TRUSTEE OF CONRAD MORRIS BRAKER, UNDER THE LAST WILL AND TESTAMENT OF CONRAD BRAKER, JR., DECEASED, AND A CITIZEN OF THE STATE OF NEW YORK,

Respondent.

ADDITIONAL AFFIDAVIT IN SUPPORT OF
PETITION TO POSTPONE ARGUMENT.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA, } ss.:

MONROE BUCKLEY, being duly sworn, deposes and says:

I am an attorney and counselor-at-law of the Court of Common Pleas of the County of Philadelphia, State of Pennsylvania, and of the Supreme Court of Penn-

sylvania, which is the highest court of record of said State; and I am also a member of the bar of this Honorable Supreme Court of the United States. I am associated with Charles H. Burr, Esq., the solicitor for the petitioners-complainants in the above-entitled action.

Referring to the motion returnable before this Honorable Court, on the fifth day of April, 1915, for a postponement of the argument of this cause, and particularly referring to the petition on which the said motion is based, I would respectfully allege and say as follows, to wit:

That, as appears from the said petition, this motion to postpone the argument of this cause is based on the enforced absence in Europe, of the petitioners-complainants' counsel, the above-mentioned Charles H. Burr, Esq. That, at the time the aforementioned petition was prepared and verified, the best information obtainable as to the probable return of the said Mr. Burr, was that he would return to this country about April 15th, 1915, and that, in consequence of such information, the petition herein [page 5 of the printed papers submitted on this motion] set forth accordingly.

That, since the preparation, verification and filing of the aforementioned petition, I am advised and verily believe that it will be impossible for the said Mr. Burr to return to this country until the latter part of April, 1915.

Reiterating and affirming all that has been alleged and set forth in the aforementioned petition, as to the impossibility of having this case properly presented to this Honorable Court during the absence of the said Mr. Burr, I personally allege and affirm to the same effect.

I make this affidavit in support of and as amendatory of the aforementioned petition, so that it may ap-

pear to this Honorable Court that the said Mr. Burr will not return to this country until the latter part of April, 1915, and that the prayer of the said petition be considered amended accordingly.

Sworn and subscribed before me this first day of April, 1915. } MONROE BUCKLEY.

GEORGE KOPPENHOEFER, JR.,
(Seal) *Notary Public.*
328 Chestnut Street, Philadelphia, Pa.

My commission expires March 10, 1917.



APR 3 1915

JAMES D. MAHER

CLERK

No. 296.

October Term 1914.

In the

Supreme Court of the United States

In Equity.

JOHN A. B. BROWN and FRANK E. SCHERMERHORN, as trustee for Clara Schermerhorn under the last Will and Testament of Thomas Cunningham, deceased,

Petitioners-Complainants,

vs.

AUSTIN B. FLETCHER, as testamentary trustee, under the last Will and Testament of Conrad Braker, Jr.,

Respondent.

AFFIDAVIT.

WILLIAM P. S. MELVIN,
Solicitor for Respondent.

Supreme Court of the United States

OCTOBER TERM, 1914. No. 286.

JOHN A. S. BROWN and FRANK
E. SCHERMERHORN, trustee for
Clara Schermerhorn, under the
last will and testament of
Thomas Cunningham, de-
ceased,

against

AUSTIN B. FLETCHER, as testa-
mentary trustee of Conrad
Morris Braker, &c.

State of New York, }
County of New York, } ss. :

William P. S. Melvin, being duly sworn, says that he is the attorney of record for the defendant in this action.

That early in the last month and before the papers on the present motion were served, Mr. Monroe Buckley (who now submits his affidavit) called upon deponent and requested that because Mr. Charles H. Burr, the attorney of record in the case for complainants, was about going to Europe, deponent should stipulate that the argument of the case be postponed until the next term of the Court. Deponent declined to enter into such a

stipulation, and suggested to Mr. Buckley that inasmuch as one of the important jurisdictional questions in the case had been disposed of by the decisions of the Court in the recent causes, Nos. 454 and 455 on the present calendar (Provident Life, &c. vs. Fletcher and Brown vs. Fletcher)—it did not seem necessary that Mr. Burr should present the argument and suggested that he (Mr. Buckley) should do so.

Deponent does not object to a short postponement to oblige Mr. Burr, but he begs to say that he greatly desires this cause to be disposed of at the present term.

Wm P. S. Melvin

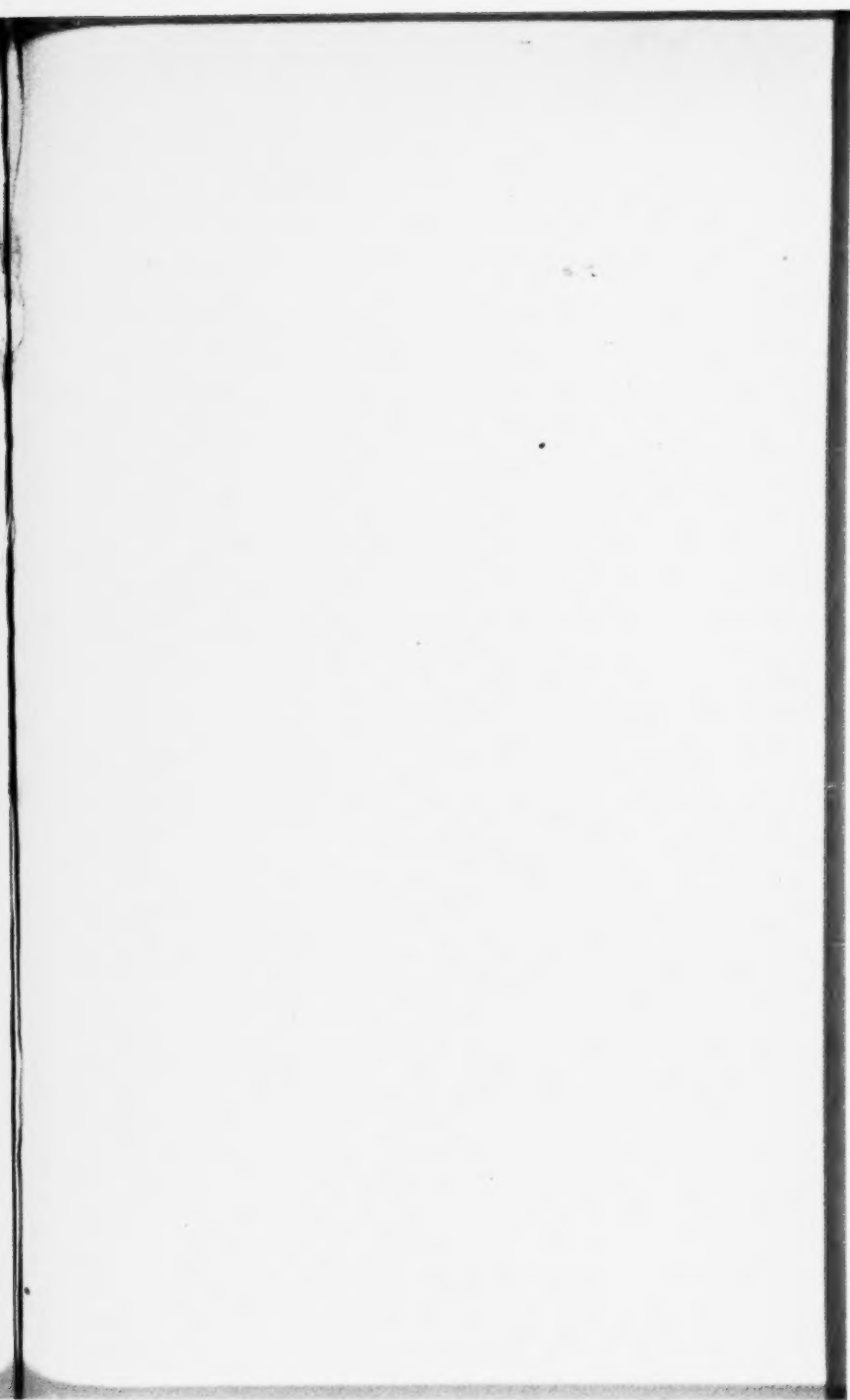
Sworn to before me this
2nd day of April, 1915.

S. A. Brumme

Notary Public

New York County

(L)



**BROWN AND SCHERMERHORN, TRUSTEES, v.
FLETCHER, AS TRUSTEE OF BRAKER.**

**CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT.**

No. 286. Argued May 13, 14, 1915.—Decided June 1, 1915.

Brown v. Fletcher, 235 U. S. 589, followed to the effect that § 24, Judicial Code, does not apply to the assignment of an interest of the *cestui que trust* of a testamentary trust fund.

Even though jurisdiction to do so exists, this court will not dispose of a case on the merits where such action would be out of harmony with the provisions of the Judicial Code giving a direct right of review on questions of jurisdiction, or where it would be incompatible with the provisions of that Code giving finality to judgments of the Circuit Court of Appeals.

The refusal of the Circuit Court of Appeals to decide a case on its merits because it erroneously held that the diversity of citizenship necessary to give jurisdiction to the Federal courts did not exist, should not, under the circumstances of this case, be made the basis of this court for deciding a case which, if jurisdiction does exist, should be finally decided by the Circuit Court of Appeals.

The District Court having taken jurisdiction of a case on the ground that diversity of citizenship existed, and decided the case on the merits, and the Circuit Court of Appeals having held that jurisdiction did not exist and reversed, with instructions to dismiss the bill, but not on the merits, this court, having found that diversity of citizen-

ship does exist, and that there is jurisdiction, does not decide the case on the merits, although it has jurisdiction so to do, but remands it to the Circuit Court of Appeals to the end that it proceed to discharge its duty of hearing and deciding the case.

206 Fed. Rep. 461, reversed.

CONRAD BRAKER, JR., of New York who there died July 21, 1891, by his will created several trusts in favor of his son, Conrad Morris Braker. The beneficiary of these trusts, the son, assigned a portion of his interest in them to one Rabe and nearly the whole of the remainder to the New York Finance Company. Rabe subsequently assigned to the Finance Company the interest which he had acquired and the Finance Company which thus claimed to be the successor or assignee to all, or nearly all, the interest of Braker, the son, under the trusts, assigned certain parts of its interest to one Cunningham and the remainder to one Wood. Cunningham having died, this suit was commenced in 1911 in the Circuit Court of the United States for the Southern District of New York by the trustees under his will to enforce one of the trusts under the assumption that it had matured and was owned by the estate of Cunningham in virtue of the assignment made to him. The jurisdiction of the court was based solely on diversity of citizenship. The bill was demurred to for various causes, one of which challenged the jurisdiction of the court on the ground that as there was no diversity of citizenship as between the original parties and hence no jurisdiction, none did or could result under the law from the assignments. The demurrer was overruled and the case on the merits was decided against the complainants who appealed to the Circuit Court of Appeals for the Second Circuit.

While the case was there, on February 5, 1913, the trustees under the will of Cunningham commenced another suit in the District Court of the United States for the Southern District of New York against the trustee

237 U. S.

Statement of the Case.

under the will, to enforce another trust which they asserted had matured and which they claimed to have a right to enforce in consequence of the assignment from the New York Finance Company. In the meanwhile Wood, to whom as we have previously said an assignment had been made, having died, his testamentary executors also on the same day commenced in the District Court a suit against the trustee of the will of Braker, to enforce the trust. The jurisdiction in both these cases also depended on diverse citizenship. The cases were put at issue by answer and while they were on the docket awaiting trial this case, which was pending in the Circuit Court of Appeals, was by that court decided June 27, 1913. The court primarily intimated opinions concerning the controlling influence of a prior ruling made in the state Surrogates Court and further intimated views on the merits which came ultimately, however, to be mere obiter since the court placed its final ruling on a question of Federal jurisdiction and held that as Braker, the son, was not a party and as diversity of citizenship did not exist if the prior parties were considered and as the assignee had no greater right than had his assignor to invoke the Federal jurisdiction, there was no jurisdiction and the decree below was therefore reversed with directions "to dismiss the bill, but not upon the merits." (206 Fed. Rep. 461.) Before, however, such decree became final a writ of certiorari was granted and in consequence of that fact the case is now before us.

After the decision of the Circuit Court of Appeals and after the granting of the writ of certiorari by this court demurrers to the jurisdiction were filed in the two cases pending in the District Court on the ground covered by the decision of the Circuit Court of Appeals in this case, and the District Court evidently following that decision changed its previous ruling and dismissed both of the cases for want of jurisdiction. Under the provisions of

§ 238 of the Judicial Code direct appeals were then prosecuted in both the cases from the District Court to this court. On these appeals as the result of the allowance of a motion to advance the cases were heard in December last and the judgments below were reversed, it being decided that the assignee under the circumstances was not within the provisions of § 24 of the Judicial Code and therefore the existence of diversity of citizenship between the parties gave authority to hear and decide the cases. *Brown v. Fletcher*, 235 U. S. 589.

Mr. Charles H. Burr for petitioners.

Mr. William P. S. Melvin for respondent.

MR. CHIEF JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

It is apparent from the statement which we have made that the ruling as to the question of jurisdiction made in the two previous cases involving the same subject-matter which is here in controversy so far as it concerned the jurisdiction of the court as a Federal court, conclusively demonstrates that the court below erred in declining to take cognizance of the cause upon the theory that it was without its jurisdiction as a Federal court to do so. While it is clear, the question of jurisdiction being thus determined, that we have power to consider and dispose of the merits, we think it is equally clear that we ought not to exert the authority, (a), because to do so would be out of harmony with the provisions of the Judicial Code, giving a right to direct review on questions of jurisdiction; and (b), because it would be in a broad sense incompatible with the provisions giving finality to the judgments and decrees of the Circuit Court of Appeals in cases, of which this is one, within the final competency of those courts. We say

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the first, because it is apparent that if we now determine the merits of this case, we shall in a large sense virtually decide the merits of the two other cases concerning in a sense the same subject-matter involved in the cases which came here on direct appeals as to jurisdiction and jurisdiction alone and which now, the question of jurisdiction alone having been determined, doubtless await the action of the District Court and the review of that action by the court below if after the cases have been decided by the District Court they are carried to the Circuit Court of Appeals for review and final decision. We say the second, because as this case is one over which the action of the court below is made final by the statute, we are of opinion that its refusal to decide the case on the merits because of an erroneous conclusion as to want of power as a Federal court to do so ought not under the circumstances here disclosed to be made the basis by which this court would perform a duty which the statute contemplates should be discharged by the court below.

Indeed, the views just stated have been applied by previous rulings. *Lutcher & Moore Lumber Co. v. Knight*, 217 U. S. 257; *United States v. Rimer*, 220 U. S. 547; *Wm. Cramp Sons v. Curtiss Turbine Co.*, 228 U. S. 645. In the *Lutcher Case* which was brought here by the allowance of a writ of certiorari, it was found that the court below, the Circuit Court of Appeals of the Fifth Circuit, had from a mistake of law refused to consider the merits of the case and although it was recognized that as the result of the certiorari the whole case was open to our review, it was yet pointed out that as by the provisions of the act of 1891 the cause was one which apart from certiorari was within the competency of the Circuit Court of Appeals and its judgment when rendered would be final, the duty of this court was not to determine the case on the merits but after correcting the error which had stood in the way of the court below performing its duty, to remand the case

to that court so that such duty might be discharged. So in the *Rimer Case* which was brought here by certiorari, when it was discovered that the writ had obviously been allowed upon a mistaken conception as to the existence in the case of a far-reaching question of public importance justifying the issue of the writ, it was pointed out that, the mistake becoming apparent, it was our duty not to decide the case but to remand it to the Circuit Court of Appeals to which the certiorari had been directed to enable that court to discharge its duty. And the same principle was involved in the *Cramp Case* where, after the case had been brought to this court by certiorari and it was held that the decision of the court below was void because the court which decided it was not legally organized, while it was recognized that there was power under the certiorari to dispose of the whole case, it was held that the duty arose in order to give effect to the statute not to decide, but to remand the case so that when the court below was organized conformably to the statute the case might be considered and disposed of as the statute contemplated it should be.

While it follows from these considerations that the decree below must be reversed, it also results that it is our duty to remand the case to the court below, that is, the Circuit Court of Appeals, to the end that, all questions concerning its jurisdiction as a Federal court having been determined by the prior decision of this court, it proceed to discharge its duty of hearing and deciding the case conformably to law.

Reversed and remanded for further proceedings consistent with this opinion.